84-1155

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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

WESTINGHOUSE ELECTRIC CORPORATION,
Appellant,

v.

JOHN K. KING, COMMISSIONER OF REVENUE,
STATE OF TENNESSEE,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF TENNESSEE

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a taxpayer, in challenging the constitutionality of a state gross receipts tax, must prove discriminatory impact on interstate commerce either by showing a risk of multiple taxation through application of the internal consistency test set forth by this Court in Armco Inc. v. Hardesty, 52 U.S.L.W. 4787 (1984) reh'g denied, 53 U.S.L.W. 3270 (1984), or by showing actual multiple taxation as required by the Tennessee Supreme Court?

2. Whether the Tennessee Business Tax is unconstitutional because it places the risk of multiple taxation on interstate commerce in violation of the Commerce Clause?

LIST OF PARTIES

The caption of this case contains the names of all parties to this proceeding. Pursuant to Rule 28.1, a list of the

companies related to Westinghouse Electric Corporation appears at page J-1 in the Appendix ("App.") to this Jurisdictional Statement.

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JURISDICTIONAL STATEMENT

INTRODUCTION

Westinghouse Electric Corporation ("Westinghouse"), the Appellant, appeals from the final judgment of the Supreme Court of the State of Tennessee ("Tennessee Supreme Court"), which held that the

imposition of the Tennessee Business Tax (Tenn. Code Ann. §§67-4-701 et seq.; former §§67-5801 et seq.) on the gross receipts received by Westinghouse from contracts between Westinghouse and the Tennessee Valley Authority ("TVA") does not violate the United States Constitution.

OPINIONS BELOW

The opinion of the Tennessee Supreme Court, dated September 10, 1984, is reported at 678 S.W.2d 19 (Tenn. 1984), and is included in the Appendix at App. A-1. Copies of the unpublished judgment of the Circuit Court of Hamilton County, Tennessee (the "trial court"), entered November 17, 1981, nunc pro tunc, and the unpublished final order of the trial court dated February 8, 1982, are attached at App. E-1 and F-1, respectively.

JURISDICTION

This is an appeal from the final decree of the Tennessee Supreme Court which affirmed the trial court's judgment in favor of Appellee, John K. King, Commissioner of Revenue for the State of Tennessee ("Commissioner"). App. B-1. The decision of the Tennessee Supreme Court was entered on September 10, 1984. Westinghouse timely filed a Petition to Rehear in the Tennessee Supreme Court, App. H-1, and the Tennessee Supreme Court denied the Petition on October 22, 1984. App. C-1 and D-1. A Notice of Appeal to this Court was duly filed in the Tennessee Supreme Court on January 15, 1985. App. G-1. The time within which to docket this appeal expires on January 21, 1985, and timely docketing has been made. This Court has jurisdiction of this appeal pursuant to 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Commerce Clause (art. I, §8, cl. 3) and Due Process Clause (amend. XIV) of the United States Constitution.

Tennessee Code Annotated, §§67-5801 et seq. (presently Tenn. Code Ann. §§67-4-701 et seq.)[1]

These constitutional and statutory provisions are set out at App. I-1.

STATEMENT OF THE CASE

Westinghouse is a Pennsylvania corporation with its principal office located in Pittsburgh, Pennsylvania. Westinghouse is primarily engaged in the business of designing, manufacturing and

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[1] The Tennessee Business Tax Act has been amended and its sections renumbered since the tax periods in question. Accordingly, only the relevant portions of the Tennessee Code as it existed during the periods in question are included in the Appendix.

selling electrical equipment, products and supplies and is authorized to do business in Tennessee.

In the late 1960's and early 1970's, Westinghouse and TVA executed four contracts whereby Westinghouse agreed to design, fabricate and sell to TVA certain nuclear steam supply systems and steam turbogenerator units for two nuclear plants to be constructed in Tennessee by TVA (the "TVA contracts"). None of the components of the equipment sold to TVA under the TVA contracts was manufactured or acquired by Westinghouse in Tennessee. The two turbogenerator units were designed and fabricated at several of Westinghouse's manufacturing facilities in Pennsylvania. Most of the components for the two nuclear steam supply systems were designed and fabricated at two of Westinghouse's facilities in Florida. The remaining components for the equipment were purchased

from manufacturers in California, Maryland, Massachusetts, New Jersey, Japan and Holland. The actual design and manufacture of the components, which Westinghouse performed outside of Tennessee, accounted for more than 98% of the contract price.[2]

In its review of the trial court's decision, the Tennessee Supreme Court acknowledged that title to all of the equipment sold under the TVA contracts passed outside the State of Tennessee.

Westinghouse did not install any of the equipment. The installation of the equipment was solely the responsibility of TVA. Under the TVA contracts, Westinghouse agreed only to furnish on-site service

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[2] Westinghouse proved at trial, without dispute by the Commissioner, that the actual design and manufacture of the components for the equipment sold under the TVA contracts accounted for more than 98% of the contract price. The entire trial transcript was included in the Record before the Tennessee Supreme Court.

engineers or field representatives to provide technical service to TVA in the installation, testing, start-up and initial operation of the equipment. Westinghouse's on-site engineers did not have authority to supervise the installation of the equipment and rendered only technical advice to TVA. Westinghouse had no responsibility to, and accordingly did not, supervise, control, regulate, or evaluate TVA's personnel, agents, or contractors or their work on the projects. Westinghouse did engage a subcontractor to insulate the walls of the reactor vessels. Westinghouse did not, however, perform any on-site installation of components; nor did Westinghouse engage in any on-site engineering or on-site modification of components.

The Tennessee Business Tax Act authorizes Tennessee's counties and municipalities to impose a privilege tax (the "Tennessee Business Tax") on "[t]he

making of sales" by engaging in certain enumerated businesses, occupations, and vocations, including, inter alia, "the business of making sales of. . .tangible personal property. . . ." Tenn. Code Ann. §§67-5802, 67-5805. In 1977, the Commissioner assessed Tennessee Business Tax deficiencies pursuant to Section 67-5808 against Westinghouse in the amount of $154,121.43 for the tax period beginning June 1, 1971, through December 31, 1971, and for each of the years 1972 through 1976, based upon 100% of the gross receipts received by Westinghouse under the TVA contracts.

The Tennessee Business Tax Act required that 100% of those receipts be attributed to Tennessee even though more than 98% of the contract price was performed outside Tennessee. There was no allocation under the Tennessee Business

Tax Act of those gross receipts between Tennessee and any other state.

Westinghouse paid under protest a total of $199,311.66 in taxes and interest to the Commissioner. Westinghouse then instituted this action against the Commissioner to recover the amounts it had paid under protest.

Westinghouse challenged the assessment and levy of the Tennessee Business Tax against it on the grounds that: (1) Westinghouse had exercised no taxable privilege in Tennessee within the scope of the Tennessee Business Tax Act; (2) the unapportioned imposition of the Tennessee Business Tax on 100% of the gross receipts received by Westinghouse under the TVA contracts violated the Due Process and Commerce Clauses of the United States Constitution and taxing limitations of Section 67-5820 of Tennessee Code Annotated; and (3) the collection of the

Tennessee Business Tax was barred by the statute of limitations. The trial court entered its judgment for the Commissioner, finding for the Commissioner on all issues and dismissing Westinghouse's complaint. Upon reconsideration, the trial court in its final order ruled that the collection of taxes paid by Westinghouse under protest for the tax year 1971 was barred by the applicable statute of limitations and awarded an amount to Westinghouse reflecting the amount paid under protest for that tax year. The trial court denied judgment to Westinghouse for the recovery of the taxes it had paid for the 1972 through 1976 tax years.

In its appeal of the trial court's decision to the Tennessee Supreme Court, Westinghouse reiterated its claims that the assessment of the Tennessee Business Tax against 100% of Westinghouse's gross receipts from the TVA contracts, without

apportionment, was unconstitutional. After the filing of briefs, but before the Tennessee Supreme Court's decision below, this Court rendered its decision in Armco Inc. v. Hardesty, 52 U.S.L.W. 4787, reh'g denied, 53 U.S.L.W. 3270 (1984). Pursuant to Armco, in order to prove a state tax unconstitutional under the Commerce Clause, a taxpayer need not show actual discriminatory impact on interstate commerce, but only the risk of such discriminatory impact.

The Tennessee Supreme Court sustained the judgment of the trial court and concluded that: (1) Westinghouse exercised a taxable privilege within the scope of the Tennessee Business Tax Act; (2) there was sufficient local incident on which to base the assessment of the Tennessee Business Tax against Westinghouse; (3) the collection of the Tennessee Business Tax was not barred by the statute of

limitations; and, (4) because Westinghouse did not demonstrate that the gross receipts from the TVA contracts were subject to actual multiple taxation, the Tennessee Business Tax was properly apportioned.

Because the Tennessee Supreme Court failed to address Armco in its decision, Westinghouse filed a Petition to Rehear in which Westinghouse asked the Tennessee Supreme Court to reconsider its decision in light of Armco. Westinghouse pointed out in its Petition to Rehear that, under Armco, Westinghouse was not required to prove that it had suffered any actual discriminatory impact. Nonetheless, The Petition to Rehear was denied by the Tennessee Supreme Court on October 22, 1984, without discussion of Armco.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented in this appeal are substantial and merit plenary

consideration for several reasons. First, the decision of the Tennessee Supreme Court is in irreconcilable conflict with the decision of this Court in Armco. The Tennessee Supreme Court concluded that, in order to prove that the Tennessee Business Tax was unconstitutional, Westinghouse was required to show that the gross receipts which Westinghouse had realized from the TVA contracts were subject to actual multiple taxation. As stated in Armco, "[t]his is not the test." 52 U.S.L.W. at 4789.

In Armco, this Court held that a state tax must have "internal consistency," such that if the same tax were applied by every other jurisdiction, there would be no impermissible interference with free trade. 52 U.S.L.W. at 4789. Such an impermissible burden exists when interstate commerce is subject to the risk of multiple taxation. Accordingly, the proper test to determine

the validity of a state tax affecting interstate commerce is not whether imposition of the tax results in actual multiple taxation, but whether the tax lacks internal consistency such that it creates an impermissible risk of multiple taxation.

Second, because the Tennessee Supreme Court failed to apply the internal consistency test found applicable in Armco, that court sustained the validity of the Tennessee Business Tax, an unapportioned gross receipts tax on interstate commerce. That tax, however, lacks the internal consistency mandated by the Commerce Clause because it taxes 100% of the gross receipts of an interstate transaction without apportionment and thus subjects a taxpayer such as Westinghouse to the impermissible risk of multiple taxation.

Finally, the questions presented for consideration by this Court in this appeal

are substantial because they are of utmost importance to the numerous taxpayers engaged in interstate commerce whose gross receipts are subject to such taxes, the taxing authorities which collect taxes measured by gross receipts, the legislative bodies which draft and adopt such tax statutes, and the courts below which must interpret such tax statutes in light of the constitutional principles enunciated by this Court.

I

The Decision of the Tennessee Supreme Court Requiring Westinghouse to Show Actual Discriminatory Impact Is Irreconcilable with This Court's Decision in Armco.

Multiple taxation, or the cumulative taxation by more than one state, of the proceeds of an interstate transaction discriminates against interstate commerce because multiple taxation is a risk to which purely local transactions are not

exposed. Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 439 (1939). The Commerce Clause prohibits multiple taxation of gross receipts realized from interstate sales, and any state taxes imposed on the proceeds of such sales must, therefore, be properly apportioned to avoid multiple taxation. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 287, reh'g denied, 430 U.S. 976 (1977); Gwin, White & Prince, 305 U.S. at 439; J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938).

In its opinion below, the Tennessee Supreme Court recognized that a tax on the gross receipts of a business engaged in interstate commerce which is not fairly apportioned creates a risk of multiple taxation on such proceeds--a risk not borne by local competitors. However, because Westinghouse did not demonstrate that the proceeds it received from the TVA contracts were subject to actual multiple taxation,

the Tennessee Supreme Court upheld the Tennessee Business Tax. Thus, the decision below makes a showing of actual multiple taxation the standard for determining whether a state tax on interstate commerce runs afoul of the Commerce Clause. This holding of the Tennessee Supreme Court is erroneous and is in irreconcilable conflict with this Court's decision in Armco.

In Armco, this Court specifically rejected West Virginia's contention that the test for discriminatory impact of state tax on interstate commerce requires the taxpayer to demonstrate actual discriminatory impact:

> Appellee suggests that we should require Armco to prove actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia. This is not the test. 52 U.S.L.W. at 4789.

Instead, this Court concluded in Armco that the proper test is one of internal

consistency of the tax itself--"'. . .that is the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade." 52 U.S.L.W. at 4789. This Court determined that the internal consistency test is to be applied when a state tax is challenged either as discriminatory against interstate commerce on its face or as unfairly apportioned. Under any other rule, this Court reasoned, "the constitutionality of [one state's] tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of taxes imposed on each taxpayer would depend on the particular other States in which it operated." 52 U.S.L.W. at 4789.

The Court's rejection of a test requiring a showing of actual multiple taxation in Armco reiterates the position taken by this Court in earlier decisions

involving the constitutionality of state taxes on interstate commerce. In Freeman v. Hewit, 329 U.S. 249 (1946), reh'g denied, 329 U.S. 832 (1947), cited by this Court in Armco, 52 U.S.L.W. at 4789, n.8, the Court rejected the argument that the validity of a gross sales tax was dependent on a showing of actual multiple taxation:

> If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. 329 U.S. at 256. (Emphasis supplied.)

The Court also addressed this same issue in Gwin, White & Prince, and held

that an unapportioned gross receipts tax discriminated against interstate commerce because it exposed interstate commerce to the risk of multiple taxation, a risk to which local commerce was not exposed. 305 U.S. at 439. The "[u]nlawfulness of the burden [upon interstate commerce] depends upon its nature measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden." 305 U.S. at 440. (Emphasis supplied.)

In J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938), the Court struck down an Indiana tax on gross receipts as applied to an Indiana manufacturer who sold 80% of its products to customers in other states. In doing so, the Court noted that:

> [t]he vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without

> apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. 304 U.S. at 311. (Emphasis supplied.)

In requiring a showing of actual multiple taxation by Westinghouse, the Tennessee Supreme Court relied on the majority opinion of this Court in General Motors Corp. v. Washington, 377 U.S. 436, reh'g denied, 379 U.S. 875 (1964). This Court's holdings, however, in Armco and Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, reh'g denied, 430 U.S. 976 (1977), constitute a rejection of the reasoning of the majority opinion in General Motors. The majority opinion in General Motors, therefore, no longer

reflects the appropriate test to determine the validity of a state tax affecting interstate commerce. By relying on the majority opinion in General Motors, the Tennessee Supreme Court applied an erroneous standard in its review of the trial court's decision.

This Court in Armco adopted essentially the same reasoning applied by the dissenting Justices in General Motors. In that dissent, authored by Justice Goldberg, three Justices objected to the suggestion that a taxpayer must show actual multiple taxation in order to demonstrate that an unapportioned gross receipts tax on interstate commerce is unconstitutional. These dissenters, relying on Freeman v. Hewit, found that the application of the Commerce Clause does not depend on the existence of actual multiple taxation, but rather the existence of potential multiple

taxation. 377 U.S. at 457 (Goldberg, J., dissenting).

This Court's decision in Armco articulates the proper test for determining whether the Tennessee Business Tax impermissibly discriminates against interstate commerce by imposing the burden of multiple taxation on the proceeds of interstate sales. Under Armco, in order to render a state tax invalid, a taxpayer must show that the tax lacks internal consistency such that if a similar tax were imposed by other states on the gross receipts from the same interstate sales, those gross receipts would be subject to multiple taxation. Armco mandates that a state tax be declared invalid if it results in a risk of multiple taxation.

The Tennessee Supreme Court in the decision below not only applied a standard which has been explicitly rejected by this Court in Armco, but also, by denying

Westinghouse's Petition to Rehear, refused to apply the Armco test to ascertain the validity of the Tennessee Business Tax as imposed against Westinghouse. The Tennessee Supreme Court decision, thus, is in irreconcilable conflict with this Court's opinion in Armco.

II

The Tennessee Business Tax Act Is Unconstitutional Because It Places the Risk of Multiple Taxation on Interstate Commerce in Violation of the Commerce Clause.

In Complete Auto Transit, Inc. v. Brady, this Court delineated the four standards that had been developed in its prior decisions to determine the validity of a state tax on interstate commerce:

> These decisions have considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing

> State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. 430 U.S. at 279.

In Armco, the Court recognized that in order for a tax to be fairly apportioned it must be internally consistent. Under the Armco test, a state tax affecting interstate commerce must be such that if any other state having a sufficient nexus to an interstate transaction were to apply a similar tax to that transaction, the interstate competitor would not face the risk of multiple taxation, a risk not borne by intrastate competitors. The Tennessee Supreme Court, in its decision below, sought to avoid the application of the fair apportionment requirement of Complete Auto and Armco by characterizing the taxable event which triggered the imposition of the tax as purely intrastate. An analysis of the Tennessee Business Tax demonstrates

clearly, however, that it imposes a tax on interstate transactions without proper apportionment. Furthermore, an analysis of Westinghouse's transactions with TVA demonstrates clearly that these transactions were interstate in character. The Tennessee Business Tax cannot be imposed on 100% of Westinghouse's gross receipts from those transactions without proper apportionment.

The Tennessee Business Tax Act authorizes Tennessee counties and municipalities to impose a privilege tax on the gross receipts of entities engaging in, inter alia, the business of "the making of sales" of tangible personal property. Tenn. Code Ann. §§67-5802, 67-5805. A "sale" for the purpose of the Tennessee Business Tax, is defined to include, inter alia, "any transfer of title or possession or both. . . ." Tenn. Code Ann. §67-5804(b). (Emphasis supplied.) This definition is

unambiguous and clearly indicates that either a transfer of title or a transfer of possession may operate independently to effect a "sale" under the Tennessee Business Tax Act. In construing these provisions of the Tennessee Business Tax Act in its decision, the Tennessee Supreme Court acknowledged that the Act does not place any significance on the place of the transfer of title and that the Act does not limit the tax to transfers of title within Tennessee. Thus, even though the Tennessee Supreme Court recognized that a "sale" may have occurred under the Act by virtue of a transfer of title outside Tennessee, that court concluded that the subsequent transfer of possession inside Tennessee was sufficient to permit Tennessee to tax 100% of the gross receipts realized from the TVA contracts.

When analyzed under the internal consistency test of Armco, the Tennessee

Business Tax unlawfully placed upon Westinghouse the risk of multiple taxation--a risk not borne by Westinghouse's local competitors. As indicated above, a taxable event (a "sale") occurs under the provisions of the statute whenever there is either the transfer of title or the transfer of possession. Under the TVA contracts, title to the equipment sold by Westinghouse to TVA passed to TVA in either Pennsylvania or Florida. Accordingly, under the Tennessee Business Tax Act, "sales" occurred in both Pennsylvania and Florida. If either Pennsylvania or Florida applied a tax which, similar to the Tennessee statute, defined a "sale" as either the transfer of title or the transfer of possession, taxable events would occur in Florida or Pennsylvania where title was transferred and also in Tennessee where delivery was made. The proceeds from such sales would,

therefore, be subject to taxation in more than one state. Such multiple taxation of the same transaction would clearly be an unconstitutional burden on interstate commerce. Armco, 52 U.S.L.W. at 4789; Freeman, 329 U.S. at 256. Gwin, White & Prince, 305 U.S. at 439. Unlike Westinghouse, a local competitor would not be subject to the risk of taxation in more than one state. Such a competitor would transfer both title and possession inside the State of Tennessee, and would be subject to taxation only by Tennessee and not by any other state.

Accordingly, the Tennessee Business Tax, as construed by the Tennessee Supreme Court in its decision below, creates a risk of multiple taxation not borne by Westinghouse's own intrastate competitors and consequently interferes with interstate commerce in violation with the Commerce Clause. The Tennessee Business Tax fails

to meet the Armco standard of internal consistency and is therefore unconstitutional.

III

This Court Should Address the Issues Presented in This Appeal.

In Complete Auto, this Court determined that a state tax would be judged on "whether the challenged tax produced results forbidden by the Commerce Clause." 430 U.S. at 285. As recognized by Justice Rutledge in his concurring opinion in Freeman v. Hewit, the function of this Court in determining the validity of state taxes affecting interstate commerce "can be done only by taking account of the specific effects of state legislation the [Commerce] clause was intended to outlaw, and of the consequences actual or probable of the legislation called in question to create them." 329 U.S. at 270. (Rutledge, J., concurring) (Emphasis supplied.)

This Court recognized in General Motors and in Standard Pressed Steel Co. v. Washington Revenue Department, 419 U.S. 560 (1975), that the vice of a tax on gross receipts of a corporation doing an interstate business, such as the Tennessee Business Tax under consideration in this case, is that, because every state has equal rights when taxing the commerce it touches, "there exists the danger that such taxes can impose cumulative burdens upon interstate transactions which are not presented to local commerce." General Motors, 377 U.S. at 440; Standard Pressed Steel, 419 U.S. at 563. The risk of multiple taxation is particularly present with respect to a tax on gross receipts when such tax is not apportioned. See Freeman, 329 U.S. at 274-75 (Rutledge, J., concurring). The Tennessee Business Tax is just such an unapportioned gross receipts tax.

The issues presented in this appeal focus upon whether a taxpayer challenging an unapportioned gross receipts tax must show that it has actually suffered the burden of multiple taxation, or whether such taxpayer must show only that the tax imposes upon it the risk of multiple taxation. Prior to this Court's rulings in Complete Auto and Armco, the Court had noted in General Motors and Standard Pressed Steel that the taxpayer in each case had failed to demonstrate that it has suffered the burden of actual multiple taxation. Based in part on such findings, the Court refused to declare the taxes in question in those earlier cases invalid.

As shown in Parts I and II, in Armco this Court rejected the test imposed on the taxpayers in General Motors and Standard Pressed Steel in favor of a test that requires the taxpayer to show the risk of multiple taxation. 52 U.S.L.W. at 4789.

The Tennessee Supreme Court failed to apply the Armco test, however, and relied instead on the rejected reasoning of the majority opinion in General Motors.

This Court should grant this appeal in order to reverse the decision of the Tennessee Supreme Court and to reaffirm its rulings in Armco, Freeman and J. D. Adams Mfg. If the decision below is allowed to stand, states other than Tennessee would be encouraged, at a time when state governments are seeking new sources of revenue, to enact taxing measures similar to the Tennessee Business Tax. Such taxes must ultimately fail, however, because they will result in an impermissible burden on interstate commerce through the multiple taxation of interstate transactions.

In addition, if the decision below is allowed to stand, interstate taxpayers would be forced into costly litigation in order to prove that they were actually

burdened with a total tax higher than their intrastate competitors. If the decision below is reversed, however, and the Court takes this opportunity to reiterate the internal consistency test of Armco, such costly litigation can be avoided.

In his concurring opinion in Freeman v. Hewit, Justice Rutledge recognized the problems which are inherent in an unwieldy rule that requires the taxpayer to prove actual multiple taxation:

> The solution by factual determination in particular cases of the actual or probable incidence of both taxes is open to two objections. One is that to some extent it would make the taxing power of one or both states depend upon whether the other had exercised, or probably would exercise, the same power. The other would lie in the volume of litigation such a rule would incite and the difficulties, in some cases at least, of making the factual determination.
>
> * * *
>
> To require factual determination of forbidden effects in each case would be to invite costly

> litigation, make decision turn in some cases, perhaps many, on doubtful facts or conclusions, and encourage the enactment of legislation involving those consequences.

329 U.S. at 278 (Rutledge, J., concurring). For these reasons, the Court should address the issues presented in this appeal.

CONCLUSION

The risk of multiple taxation imposes upon interstate commerce the same burden that actual multiple taxation imposes--that is, it impedes the free flow of commerce between the states. This is a forbidden result under the Commerce Clause. This Court should take this opportunity to reaffirm its holding in Armco and determine that the Tennessee Business Tax is unconstitutional as applied to Westinghouse in this case.

For the foregoing reasons, this Court should note probable jurisdiction of this appeal in order to reverse the decision of the Tennessee Supreme Court.

Respectfully submitted,

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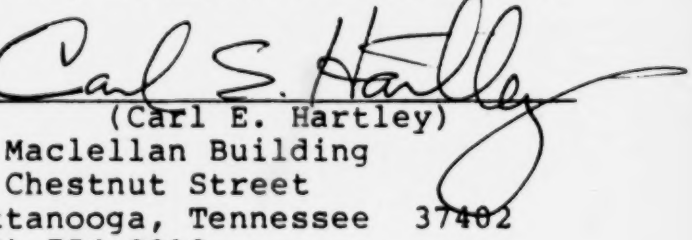
Dated: 1/16/85

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 28.3 of the Supreme Court of the United States, a true and exact copy of the foregoing Jurisdictional Statement has been deposited in the United States Mail with first-class postage prepaid, addressed to Mr. Joe C. Peel, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219, on this 16th day of January, 1985.

STOPHEL, CALDWELL & HEGGIE, P.C.

By 
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APPENDIX A

Opinion of the Supreme Court of Tennessee

WESTINGHOUSE ELECTRIC CORPORATION

v.

JOHN K. KING, Commissioner of Revenue, State of Tennessee

Sept. 10, 1984

OPINION

BROCK, Justice.

I

The plaintiff, Westinghouse Electric Corporation (Westinghouse) brought this suit against the Commissioner of Revenue in the Circuit Court for Hamilton County, Tennessee, seeking recovery of taxes and interest paid under protest under the Business Tax Act, T.C.A., §§ 67-5801, et seq. (now T.C.A., §§ 67-4-701, et seq.). The taxes were paid for the years 1971-76 and were based upon the proceeds of

contracts between Westinghouse and the Tennessee Valley Authority (TVA). The trial court found that the statute of limitations barred collection of the 1971 taxes, but it found Westinghouse liable for taxes and interest in all other years and entered judgment accordingly. Westinghouse is appealing the judgment raising issues concerning the nature of the business tax and its applicability to the transactions with TVA, the base from which the taxes were calculated, apportionment of the taxes, and statute of limitations.

Westinghouse is a Pennsylvania corporation, maintaining its principal office and place of business in Pittsburgh, Pennsylvania. It designs, manufactures and sells electrical equipment, products and supplies and is authorized to do business in Tennessee as a foreign

corporation. At all times pertinent to this case, it had sales offices and manufacturing plants located throughout Tennessee.

Between 1968 and 1971, Westinghouse entered into four contracts with TVA whereby Westinghouse agreed to design, manufacture, and sell nuclear steam supply systems and turbo-generator units to TVA for the Sequoyah Nuclear Plant and Watts Bar Nuclear Plant in Hamilton and Rhea Counties, Tennessee. All of the contracts were signed on or before January 26, 1971. At the time the contracts were negotiated, Westinghouse had sales representatives in Tennessee specifically assigned to TVA. Employees from Tennessee were part of the Westinghouse team which negotiated the contracts. According to the testimony of Mr. Franklin E. Rolston, Westinghouse's field sales representative working out of

Chattanooga, the Tennessee marketing team "was responsible for the interface and coordination of any substantial project that Westinghouse would have to TVA." Westinghouse submitted all bids to TVA through its Chattanooga office.

The equipment purchased by TVA under the contracts was either manufactured or purchased by Westinghouse outside the state of Tennessee. TVA was to make progress payments as each unit of equipment was completed. Titled passed to TVA when the payment was made. It is not disputed that in all instances title passed outside Tennessee.

Westinghouse also provided on-site technical assistance to TVA under the contracts. The duties of Westinghouse personnel at the sites included answering questions, interpreting drawings, assisting in setting up installation

procedures, handling reports of defective components and maintaining a schedule of installation progress. Westinghouse technical advisers did not have the authority to supervise installation, but it was part of their job to insure that the equipment was installed according to its design in order to protect the warranties. The contract required that the equipment be able to perform. TVA retained 10% of the contract price until the systems were commercially operating. At the time of trial some ten to twelve years after the contracts were signed, commercial operation had not yet been reached.

During the tax period in question, the Chattanooga office of Westinghouse remained involved in the execution of the contracts. The hundreds of contract changes made necessary by regulatory

changes and TVA's requirement of state of the art equipment were channeled through Chattanooga. The Chattanooga sales office participated in the resolution of problems encountered in the performance of the contract. Sales personnel visited the TVA sites regularly both to check on the progress of the installation and to solicit TVA business for other Westinghouse products. According to one Westinghouse employee, TVA's satisfaction with the manner in which the contracts were handled affected the possibility of Westinghouse's obtaining future TVA contracts.

In the period from June 1, 1971, to December 31, 1976, Westinghouse filed business tax returns but did not report the proceeds from the TVA contracts which it received during those years. On January 17, 1978, it paid under protest an

additional $154,121.43 in business taxes based on the TVA contracts. After filing this suit for a refund, it paid under protest an additional $45,195.23 in interest. As stated above, the trial court awarded Westinghouse a refund of $9,282.35 plus interest for the tax year 1971, an action which is not now disputed by the Commissioner. Westinghouse, however, appeals the remainder of the trial court's order denying it a refund.

II

The plaintiff insists that it did not exercise a taxable privilege within the statutory scope of the Business Tax Act. The taxable privilege relevant to this case is set out in T.C.A., §§ 67-5802 and 5805. According to § 67-5802:

> ". . . the making of sales by engaging in any vocation, occupation, business or business activity enumerated, described or referred to in § 67-5805,

> classification 1, classification 2, and classification 3 is declared to be a privilege upon which each county and/or incorporated municipality in which said business, business activity, vocation, or occupation is carried on may levy a privilege tax. . . ."

The Commissioner classified the business activities of Westinghouse under classification 2. Section 67-5805 provides in pertinent part:

> "Businesses, vocations, and occupations which are taxable are set forth in the following classifications: provided, however, that each person shall be classified according to the dominant business activity.
>
> * * * * * *
>
> "Classification 2
>
> "Each person engaged in the business of making sales of the following:
>
> * * * * * *
>
> "(f) Tangible personal property not specifically enumerated or described elsewhere in this chapter."

The State argues that the tax is on the privilege of engaging in business in Tennessee. Westinghouse stipulated that it was doing business in Tennessee, but insists that the statute does not impose an ordinary doing business tax. Rather, the statute requires both doing business and the making of sales within the state. Because the TVA contracts are not sales within the state, it argues that these transactions were not taxable.

The primary purpose of statutory construction is to ascertain and give effect, if possible, to the intention or purpose of the legislature as expressed in the statute. Worrall v. Kroger Co., 545 S.W.2d 736, 738 (Tenn. 1977); State ex rel. Rector v. Wilkes, 222 Tenn. 384, 389, 436 S.W.2d 425 (1968). The Court should not lift one word or clause from a statute and construe it alone without reference to

the balance of the statute. State ex rel. Rector v. Wilkes, supra, 222 Tenn. at 390, 436 S.W.2d at 427. Statutes relating to the same subject matter should be construed together. Belle-Aire Village, Inc. v. Ghorley, 574 S.W.2d 723 (Tenn. 1978).

Westinghouse focuses on the language of § 67-5802 which taxes as a privilege "the making of sales by engaging in" certain enumerated business activities. This language, however, must be construed together with § 67-5805 which refers to "businesses, vocations and occupations which are taxable" and which classifies persons "according to the dominant business activity." It then taxes persons "engaged in the business of making sales" of certain enumerated items.

The statute does not impose a tax on the sale as such. Rather, when construed

together, the statutory provisions tax the privilege of doing business as that business is defined by the statute. The business of making sales of tangible personal property is a taxable privilege under the statute.[1] Thus, the statutory provisions pertinent to this case do not tax all business activity but only that business activity engaged in selling tangible personal property. This interpretation of the statute is in agreement with Worrall v. Kroger, Co., supra, 545 S.W.2d at 738, where we stated that in enacting the Business Tax Act in 1971:

> ". . . the legislature undertook to create a system of state and local taxation upon the privilege of engaging in certain types of business activities, replacing certain parts of the privilege tax law of the state and providing for a classification of

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[1]Classification 4 of § 67-5805, on the other hand, taxes the privilege of engaging in the business of contracting or performing a contract.

> businesses for the state and local administration of the system of taxation established in the Act." (Emphasis added.)

Westinghouse next argues that even if the tax is on the privilege of doing business by making sales, the statute does not tax the privilege of engaging in business by making sales when, as in the sales to TVA, title passes outside the state. Alternatively, Westinghouse contends that the base on which the tax is calculated is limited to sales in which title passes in-state.[2]

Both arguments are based on T.C.A., § 67-5804(b), which provides in pertinent part as follows:

> "(b) 'Sale' means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional, or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration, and includes the

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[2]The tax is one-fortieth (1/40) of one percent (1%) of all the wholesale sales of the business. T.C.A. § 67-5806.

> fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrication work, and the furnishing, repairing or servicing for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property."

Although subsection (b) defines a sale as including, inter alia, a transfer of title, it does not place any significance on the place of the transfer of title. Indeed, we find no explicit language in this subsection or the remainder of the Act limiting the tax to transfers of title within the state.

There have been a number of United States Supreme Court decisions, however, which have addressed constitutional limitations on state taxation of the privilege of engaging in businesses which make sales with interstate aspects. By virtue of T.C.A., § 67-5820, these

decisions are relevant in determining legislative intent regarding the extent to which the Business Tax Act can reach transactions that have interstate elements. Section 67-5820 provides:

> "Legislative intent--Constitutional limitations acknowledged.--It is the legislative intent, within the framework of this chapter, to recognize that there are limitations upon state taxation imposed by the Constitution of the United States and of this state and not to impose the tax where prohibited therein; but it is intended to impose the tax to the extent permitted under such constitutions and the words of imposition used herein."

Westinghouse argues that decisions on the constitutionality of privilege taxes are inapplicable due to the special nature of the Tennessee statute. In light of our earlier discussion, we reject this argument.

As a general principle, a state may not lay a tax on the privilege of engaging in interstate commerce under the Commerce

Clause. General Motors Corporation v. Washington, 377 U.S. 436, 446, 84 S. Ct. 1564, 1571, 12 L.Ed.2d 430 (1964). But it is not the purpose of the Commerce Clause

> "to relieve those engaged in interstate commerce from the just share of state tax burden even though it increases the cost of doing the business."
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> Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254, 58, S. Ct. 546, 548, 82 L.Ed. 823 (1938).

Thus, a state may impose a tax if there is a sufficient local incident on which to base the tax. General Motors Corporation v. Washington, supra, 377 U.S. at 447, 84 S. Ct. at 1571.

In Norton Co. v. Department of Revenue of State of Ill., 340 U.S. 534, 71 S. Ct. 377, 95 L.Ed. 517 (1951), the taxpayer, a Massachusetts corporation with an Illinois branch office, complained of an Illinois tax on "persons engaged in the business of

selling tangible personal property," the amount of the tax based on gross receipts. The Illinois office maintained an inventory and made direct sales to Illinois customers. When it lacked an item on its inventory, the Illinois office forwarded the order to Massachusetts. The goods were then shipped directly to the Illinois customer f.o.b. Worchester, Massachusetts.

The court upheld taxation as to all sales in which the Illinois branch either distributed goods or received orders. In language pertinent to the case before us, it stated that the taxpayer "cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business." 340 U.S. at 539, 71 S. Ct. at 381.

In General Motors Corporation v.

Washington, supra, the taxpayer, General Motors, manufactured automobiles outside the taxing state of Washington, and then sold them to independent dealers within the state. To assist in the sales, General Motors maintained district managers within the state. A district manager worked out of his home. He met regularly with the dealers within his district, and assisted them in the preparation of orders. The orders were sent by the dealers to an out-of-state zone office. The orders were accepted or rejected out of state. Sales were completed by shipments f.o.b. the out of state factory. 377 U.S. at 442-445, 84 S. Ct. at 1568-70. In upholding the tax, the Court held that the activities of General Motors within the state were substantial, "particularly with relation to the establishment and maintenance of

sales, upon which the tax was measured." Id. at 447, 84 S. Ct. at 1571.

The court again considered a Washington privilege tax in Standard Pressed Steel Co. v. Washington Dept. of Rev., 419 U.S. 560, 95 S. Ct. 706, 42 L.Ed.2d 719 (1975).[3] The court set forth the following facts:

> "Appellant, a manufacturer of industrial and aerospace fasteners (nuts and bolts generally), has its home office in Pennsylvania, one manufacturing plant there and another in California. Its principal customer in the State of Washington is the Boeing Company, in Seattle. In the years relevant here it had one employee, one Martinson, in Washington who was paid a salary and who operated out of his home near Seattle. He was an engineer whose primary duty was to consult with Boeing regarding its anticipated needs and requirements for aerospace fasteners and to follow up any difficulties in the use of appellant's product after delivery. Martinson was assisted by a group of engineers of appellant who visited

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[3]The Washington statute was similar to the Tennessee statute, taxing persons "in the business of making sales at wholesale." Wash. Rev. Code § 82-04.270.

> Boeing about three days every six weeks, their meetings being arranged by Martinson. Martinson did not take orders from Boeing; they were sent directly to appellant. Orders accepted would be filled and shipment made by common carrier to Boeing direct, all payments being made directly to appellant. Martinson had no office except in his home; he had no secretary; but appellant maintained an answering service in the Seattle area which received calls for Martinson, bills for that service being sent direct to appellant."

Id. at 561, 95 S. Ct. at 708.

The appellant argued that its connections to Washington were so thin as to make the tax a violation of due process. The court rejected this claim noting that the appellant's one Washington employee "made possible the realization and continuance of valuable contractual relations between appellant and Boeing." Id. The court rejected the Commerce Clause claim, relying upon General Motors Corporation v. Washington, which it found "almost precisely in point." Id. at 563,

95 S. Ct. at 709.

Before considering the facts in the instant case, we note as a prefatory matter that although the contracts were negotiated and signed prior to June 1, 1971, the effective date of the Business Tax Act, the Commissioner relies only upon activities in Tennessee on or subsequent to that date to show the involvement of Westinghouse's Tennessee offices in fulfilling the TVA contracts. Further, Westinghouse was taxed only on the basis of proceeds it received after June 1, 1971. Of course, receipt of the proceeds was dependent upon contracts signed prior to the Act. But the general rule is that a statute, including a tax statute, is not retroactive simply because it relates to antecedent facts. Tower Plaza Investments, Limited v. DeWitt, 109 Ariz. 248, 508 P.2d 324 (1973); see e.g.,

Broadacre Dairies v. Evans, 193 Tenn. 441, 246 S.W.2d 78 (1952) (Proceeds from lease entered into prior to enactment of tax but received subsequent to the same are subject to tax).

Turning now to the facts, Westinghouse maintained marketing offices in Chattanooga and Knoxville. The Chattanooga office in particular served as a conduit between Westinghouse and TVA during the execution of the contract. The contract files were maintained in Chattanooga. The hundreds of changes required during the course of the contract were coordinated and executed by Chattanooga. Chattanooga sales personnel met frequently with TVA, processed TVA complaints regarding the project and worked with TVA on necessary modifications.

In addition, on-site Westinghouse

engineers provided technical assistance to TVA in the installation of the equipment. Although Westinghouse personnel did not have supervisory authority, their technical assistance was required by the contract and clearly played an essential role in the whole transaction.

We thus have no difficulty in finding a sufficient local incident on which to base the tax. Westinghouse's activities in-state were at least as substantial as those in General Motors Corporation v. Washington, if not more so, and certainly more substantial than those in Standard Pressed Steel. We, therefore, conclude that Westinghouse exercised a taxable privilege during the tax years in question and that the Commissioner properly included the proceeds of the contract received during those years on Westinghouse's tax base.

Westinghouse next complains that the tax is not properly apportioned. A tax not apportioned to the activities carried on within the state burdens interstate commerce the same as if the tax were on the privilege of engaging in interstate commerce. Gwin, White & Prince v. Henneford, 305 U.S. 435, 438-39, 59 S. Ct. 325, 326, 327, 83 L.Ed. 272 (1939). Lack of apportionment risks multiple taxation, a risk not borne by purely local commerce. Id. The taxpayer, however, must demonstrate that it suffers from the burden of multiple taxation. General Motors Corporation v. Washington, supra, 377 U.S. at 449, 84 S. Ct. at 1572.

Westinghouse has made no showing that it suffers from multiple taxation. Further, in both General Motors Corporation v. Washington and Standard Pressed Steel, cases with similar facts to

the ones before us, the taxing statutes withstood attacks on apportionment grounds. In Standard Pressed Steel, the privilege tax was measured by the proceeds from sales to a Washington customer. The Supreme Court observed that the tax was "'apportioned exactly to the activities taxed,' all of which are intrastate." 419 U.S. at 564, 95 S. Ct. at 709.

The Tennessee taxes levied on Westinghouse are measured by the sale proceeds from the goods delivered in Tennessee to a Tennessee buyer, T.V.A. Westinghouse maintained Tennessee offices for the sales. As in General Motors Corporation and Norton Co. v. Department of Revenue of State of Ill., supra, Westinghouse did not establish that its Tennessee activities "were not decisive factors in establishing and holding this market." General Motors Corporation v.

Washington, 377 U.S. at 448, 84 S. Ct. at 1571-72. We, therefore, conclude that the taxes are properly apportioned.

III

Westinghouse argues that the applicable statute of limitations bars collection of taxes for the years 1972 and 1973. The applicable statute for the 1972 claim is T.C.A., § 67-1323(a) (now T.C.A., § 67-1-1501(a)), which provides:

> "(a) AD VALOREM AND LOCALLY COLLECTED PRIVILEGE TAXES.--All state, county, school and municipal taxes assessed on property, and all state, county or municipal privilege taxes (including, but not limited to, business, litigation, real estate transfer and mortgage taxes) collected by local officials for the benefit of cities, counties or the state shall be barred, and any lien for such taxes be cancelled and extinguished, unless the same are collected or suits for the collection shall have been instituted within six (6) years from the first of January of the year for which such taxes accrued."

The determinative issue is when the

tax "accrued." Westinghouse takes the position that the 1972 tax accrued on December 31, 1972, when it became payable. Accordingly, the statute began to run on January 1, 1972, expiring on January 1, 1978, prior to the collection of taxes on January 17, 1978. We disagree.

In R. J. Reynolds Tobacco Co. v. Carson, 187 Tenn. 157, 213 S.W.2d 45 (1948), the Court interpreted § 1494 of the Code of 1932, the predecessor of § 67-1323(a) and identical to it in all respects here pertinent. The Court stated:

> "A Statute of Limitation runs only after the accrual of a complete right of action. Columbian Mut. Life Ins. Co. v. Martin, 175 Tenn. 517, 136 S.W. (2d) 52; 34 Am. Jur., 91. Code sec. 1494 provides that the Statute of Limitation commences to run from January 1st, of the year in which the tax accrues.
>
> "'. . . the courts uniformly hold that a right of action generally accrues when the complainant can bring suit to

> recover a sum of money alleged to be due and unpaid.' Henwood v. McCallum & Robinson, Inc., 179 Tenn. 531, 535, 167 S.W. (2d) 981, 982." (Emphasis in original.)

Id. at 172, 213 S.W.2d at 51.

Then § 67-5807 provided that business taxes under classification 2 for the year 1972 would have been payable on December 31, 1972. The taxes were not, however, due on that day. The taxpayer was not required to file a return until March 1 of the following year, and the taxes did not become delinquent until that day. T.C.A., § 67-5807. Further, § 67-5808 (now T.C.A., § 67-4-719(b)) empowers the appropriate authority to issue a distress warrant for the collection of taxes only when the tax becomes delinquent.

Westinghouse's 1972 taxes did not become due and unpaid such that a cause of action accrued for their collection until

they became delinquent on March 1, 1973. See also, Grant Bond & Mortgage Co. v. Ogle, 17 Tenn. App. 112, 120, 65 S.W. 2d 1091 (1933) ("statute of limitations [§ 1494, 1932 Code] runs from the time they [the taxes] become delinquent"). The statute therefore began to run January 1 of the year of accrual, 1973, and the Commissioner collected the tax owed within six years.

In reaching this decision, we find that Woods v. TRW, Inc., 557 S.W.2d 274 (Tenn. 1977), on which Westinghouse relies, is inapposite. In TRW, the parties stipulated among other facts that the six year statute began to run on January 1 of the tax year rather than of the following year. The resolution of the legal issue of accrual under § 67-1323(a) had no bearing on the issues on appeal and the parties did not address it. Likewise,

we did not address this issue in our opinion. Our recitation as background of the stipulations of the parties, including the stipulation on the statute of limitations, does not constitute authority for the proposition that the statute began to run on January 1 of the tax year.

In arguing that collection of its 1973 taxes is time-barred, Westinghouse relies upon Public Acts of 1973, ch. 368, § 3(b) (now amended and codified at § 67-1-1501(b)), which provided in pertinent part:

> "(b) ALL TAXES REQUIRING THE FILING OF RETURNS.--Notwithstanding the provisions of subsection (a) [of T.C.A. § 67-1-1501], the amount of any tax imposed under any title wherein the filing of a return is required shall be assessed within three (3) years from December 31 of the year in which such tax became due and payable, and no levy or other proceeding to enforce the collection of such tax without such assessment shall be made or begun after the expiration of such period . . . ."

Evidence was introduced at trial which attempted to show that the taxes were not assessed within the three year period required by the statute. We do not need to determine whether the assessment was timely since we hold that the 1973 Act is not applicable.

In Public Acts of 1974, ch. 484, § 2(b), the legislature replaced the language quoted above with the following:

> "'(b) STATE TAXES REQUIRING THE FILING OF RETURNS: ASSESSMENT.--Notwithstanding the provisions of subsection (a), the amount of any tax imposed under any title, wherein the filing of a return is required by the state, shall be assessed within three (3) years from December 31 of the year in which the return was filed and no levy or other proceeding to enforce the collection of such tax without assessment shall be made or begun after expiration of such period; provided, however, that'; and"

This Act is presently codified at T.C.A., § 67-10-1501(b).

Under the 1974 Act only state taxes

must meet the three year statute of limitations on assessment. Business taxes which fall under classification 1-3 of T.C.A., § 67-5805, are not state taxes, but are instead local privilege taxes which each county and/or municipality is permitted to levy. Returns on these taxes are filed with the appropriate local government rather than the state. T.C.A., § 67-5807. By contrast, T.C.A., § 67-5803, specifically declares that the privilege of engaging in businesses which fall under classification 5 of § 67-5805 is a state privilege taxable by the state alone with the return to be filed with the Commissioner of Insurance. T.C.A., § 67-5807. Thus, if the 1974 Act is applicable to Westinghouse's 1973 taxes, as a privilege falling under classification 2, then Westinghouse was exercising a local privilege not affected

by the three year limitation on assessment.

Under the 1973 Act, the limitation period on assessments began to run on December 31 of the year the tax was due and payable. For reasons discussed in the preceding issue, Westinghouse's 1973 taxes were not due until March 1, 1974. The three year limitation period would not have begun until December 31, 1974. The 1974 Act, however, replaced the 1973 Act on March 4, 1974. Accordingly, when the three year limitation period would have begun to run on the 1973 taxes, no such statute of limitation was in effect.

Having determined that the judgment of the trial court should be affirmed, we do not address the other arguments raised by the Commissioner in support of the judgment of the lower court.

The decree of the trial court is affirmed. The costs of this appeal are taxed to the appellant.

/s/ Brock, J.
BROCK, J.

Cooper, C.J., Fones, Harbison and Drowota, JJ., Concur.

APPENDIX B

Decree of the Supreme Court of Tennessee

SUPREME COURT OF TENNESSEE, AT KNOXVILLE
SEPTEMBER TERM 1984

DECREE

WESTINGHOUSE ELECTRIC CORPORATION, Plaintiff-Appellant	Hamilton Law (No. N-23361)
Vs.	
JOHN K. KING, COMMISSIONER OF REVENUE, STATE OF TENNESSEE, Defendant-Appellee	AFFIRMED AND REMANDED

This cause coming on to be heard upon a transcript of the record from Circuit Court of Hamilton County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the judgment of the Court below there is no error.

It is therefore ordered and adjudged by the Court that the judgment of the

Court below be in all things affirmed and that this case be and hereby is remanded to the Circuit Court of Hamilton County for enforcement of the decree of the trial court and for such further proceedings as may be necessary consistent with the Opinion of this Court, a copy of which shall accompany the procedendo on the remand to the trial court.

Costs incident to the appeal are adjudged against the Appellant, Westinghouse Electric Corporation, and sureties, Stophel, Caldwell & Heggie, Attorneys, and execution may issue from this Court for the costs incident to the appeal. This cause is remanded to the trial court aforesaid for the collection of the costs adjudged therein, in the manner provided by law.

Ray L. Brock, Jr., J.
Robert E. Cooper, C.J.
Wm. H. D. Fones, J.
William J. Harbison, J.
Frank F. Drowota, III., J.

Filed September 10, 1984

APPENDIX C

Opinion of the Supreme Court of Tennessee on Petition to Rehear

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

WESTINGHOUSE ELECTRIC CORPORATION,	)	
Plaintiff-Appellant,	)	Appeal from the Circuit Court for Hamilton County
v.	)	Hon. Robert M. Summitt, Judge
JOHN K. KING, COMMISSIONER OF REVENUE, STATE OF TENNESSEE,	)	
Defendant-Appellee.	)	

OPINION ON PETITION TO REHEAR

The Court has considered the Petition to Rehear filed by the Appellant is of the opinion that the same should be and is hereby overruled.

The Petition to Rehear is denied at the cost of the Appellant, Westinghouse Electric Corporation.

/s/ Brock, J.
BROCK, J.

Cooper, C.J., Fones, Harbison and Drowota, JJ., Concur.

Filed October 22, 1984.

APPENDIX D

Order of the Supreme Court of Tennessee
Denying Petition to Rehear

SUPREME COURT OF TENNESSEE, AT KNOXVILLE
SEPTEMBER TERM 1984

WESTINGHOUSE ELECTRIC CORPORATION,	)	
Plaintiff-Appellant	)	
V.	)	Hamilton Law (No. N-23361)
JOHN K. KING, COMMISSIONER OF REVENUE, STATE OF TENNESSEE	)	
Defendant-Appellee	)	

PETITION TO REHEAR DENIED

This cause came on to be further heard on the Petition to Rehear filed by the Appellant, Westinghouse Electric Corporation, and upon consideration thereof the Court is of the opinion the Petition to Rehear is not well taken and should be denied.

It is therefore ordered and decreed by the Court that the Petition to Rehear is denied, at the cost of the Appellant, Westinghouse Electric Corporation, and sureties, Stophel, Caldwell & Heggie, Attorneys, for which let execution issue.

Ray L. Brock, Jr., J.
Robert E. Cooper, C.J.
Wm. H. D. Fones, J.
William J. Harbison, J.
Frank F. Drowota, III., J.

Filed October 22, 1984.

APPENDIX E

Judgment of the Circuit Court of Hamilton County, Tennessee

WESTINGHOUSE ELECTRIC CORPORATION	)	DOCKET NO. N-23361
VS	)	IN THE CIRCUIT COURT OF
JOHN K. KING, COMMISSIONER OF REVENUE, STATE OF TENNESSEE	)	HAMILTON COUNTY, TENNESSEE

JUDGMENT FOR DEFENDANT

The foregoing case came on to be heard before the Court without the intervention of a jury.

Upon the hearing, proof and proceedings and after due consideration thereof, the Court finds the issues in favor of the defendant.

It is therefore ORDERED by the Court that judgment be and the same is hereby entered for the defendant.

The costs of the cause are taxed against the plaintiff and surety for which execution may issue.

This Order was made the 17th day of November, 1981 and is entered this 19th day of November, 1981, nunc pro tunc.

/s/ Robert M. Summitt
JUDGE, FIRST DIVISION

APPENDIX F

Final Order of the Circuit Court of Hamilton County, Tennessee

WESTINGHOUSE ELECTRIC CORP.	)	DOCKET NO. N-23361
V.	)	IN THE CIRCUIT COURT OF
JOHN K. KING, COMMISSIONER OF REVENUE, STATE OF TENNESSEE	)	HAMILTON COUNTY, TENNESSEE

FINAL ORDER

This cause came on to be heard before the Honorable Robert M. Summitt, Judge, Hamilton County Circuit Court, First Division, upon the plaintiff's motion to alter or amend the judgment entered by the court on November 19, 1981. Upon the pleadings, argument of counsel, and the entire record in this cause, the court found that the judgment entered on November 19, 1981 failed to allow for the

recovery to the plaintiff as actually rendered at the trial on November 17, 1981 with respect to the taxes for the tax year ending December 31, 1971.

It is hereby ORDERED that the judgment heretofore entered is amended to read as follows:

1. With respect to the taxes paid for the tax year ending December 31, 1971 the plaintiff is allowed recovery in the amount of $9,282.35 plus interest at the rate of 6% from date of payment to May 1, 1979 and interest at the rate of 10% from May 1, 1979 to the date of the judgment herein and the recovery shall bear post-judgment interest as provided by law.

2. The balance of the complaint is dismissed and the costs of this cause are taxed to the plaintiff, for which execution shall issue, if necessary.

ENTERED this 9th day of February, 1982.

/s/ Robert M. Summitt
JUDGE

APPROVED FOR ENTRY:

STOPHEL, CALDWELL & HEGGIE, P.C.

BY: /s/ T. O. Helton

Attorneys for Plaintiff

/s/ Joe C. Peel
JOE C. PEEL
Asst. Attorney General

APPENDIX G

Notice of Appeal to the Supreme Court of Tennessee

IN THE SUPREME COURT OF

THE STATE OF TENNESSEE

AT KNOXVILLE

WESTINGHOUSE ELECTRIC CORPORATION,	)	
Appellant,	)	
v.	)	SUPREME COURT NO. 154
JOHN K. KING, Commissioner of Revenue, State of Tennessee,	)	
Appellee.	)	

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

Notice is hereby given that the Appellant, Westinghouse Electric Corporation ("Westinghouse"), hereby appeals to the Supreme Court of the United States from the final judgment of the

Supreme Court of the State of Tennessee. That final judgment was entered by the Tennessee Supreme Court in this action on September 10, 1984, and affirmed the judgment rendered in the Circuit Court of Hamilton County, Tennessee, in favor of Appellee, John K. King. Westinghouse's timely filed Petition to Rehear was denied by the Tennessee Supreme Court on October 22, 1984.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

STOPHEL, CALDWELL & HEGGIE, P.C.

By /s/ T. O. Helton
(Thomas O. Helton)

By /s/ Carl E. Hartley
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APPENDIX H

Petition to Rehear of
Westinghouse Electric Corporation

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

WESTINGHOUSE ELECTRIC CORPORATION,	)	
Plaintiff/ Appellant,	)	
v.	)	SUPREME COURT NO. 154
JOHN K. KING, COMMISSIONER OF REVENUE,	)	
Defendant/ Appellee.	)	

ON APPEAL FROM THE CIRCUIT COURT FOR

HAMILTON COUNTY, TENNESSEE

PETITION TO REHEAR

Pursuant to Rule 39 of the Tennessee Rules of Appellate Procedure, Petitioner and Plaintiff-Appellant, Westinghouse Electric Corporation ("Westinghouse"),

would respectfully show to the Court that Westinghouse is much aggrieved by the Judgment and Opinion announced in this case on September 10, 1984, wherein the Court affirmed the Circuit Court's ruling that Westinghouse was not entitled to a refund of taxes and interest paid under protest to the Defendant-Appellee, the Commissioner of Revenue.

Westinghouse submits that the Court incorrectly determined that the 1974 version of T.C.A. §67-1-1501(b)* did not apply to the assessment of Westinghouse's 1973 taxes, and that the Court's Judgment and Opinion as to the 1972 taxes is in conflict with the clear and unambiguous language of T.C.A. §67-1-1501(a).

Westinghouse further submits that the Court improperly placed the burden of

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*All Section references are to the current Tennessee Code.

showing actual multiple taxation on Westinghouse in contravention of the United States Supreme Court's recent decision in Armco Inc. v. Hardesty, that the Court's decision is in conflict with certain constitutional principles articulated in Armco, and further violates certain rules of statutory construction.

The remainder of this Petition is devoted to argument and the discussion of authorities in support of Westinghouse's position as to these issues.

Petitioner, therefore, respectfully prays that this Honorable Court grant a rehearing of this cause to the end that the Judgment and Opinion announced on September 10, 1984, be set aside and that the Circuit Court's holding in this case be reversed.

BRIEF IN SUPPORT OF PETITION TO REHEAR

I. Application of the Statute of Limitations to the 1973 Year -- Westinghouse Submits that the Court Misapprehended the Language of T.C.A. §67-1-1501(b)

In its Opinion, the Court stated that "only state taxes must meet the three year statute of limitations on assessment" prescribed by the 1974 version of T.C.A. §67-1-1501(b), 1974 Public Acts, Ch. 484, §2(b). Opinion, p. 16. Because the Court viewed Westinghouse's 1973 taxes as being local privilege taxes falling under classification 2 of T.C.A. §67-4-708, the Court considered the 1974 Act inapplicable to the collection of Westinghouse's 1973 taxes.

Westinghouse submits that the 1974 Act is applicable to the collection of Westinghouse's 1973 taxes. The Business Tax Act mandated that the State collect

Westinghouse's 1973 taxes. Such taxes cannot be considered local taxes.

The 1974 Act required as follows:

> (b) STATE TAXES REQUIRING THE FILING OF RETURNS: ASSESSMENT. - Notwithstanding the provisions of subsection (a), the amount of any tax imposed under any title, wherein the filing of a return is required by the state, shall be assessed within three (3) years from December 31 of the year in which the return is filed and no levy or other proceeding to enforce the collection of such tax without assessment shall be made or begun after expiration of such period.... (Emphasis supplied.)

All that must be shown in order to come within the purview of the statute is that the tax is imposed by "any title" of the Code and that "the filing of a return is required by the state." (Emphasis supplied.) The Business Tax is imposed by the State Code, and the State required the filing of Westinghouse's 1973 tax return, pursuant to T.C.A. §67-4-719. The Commissioner, and not an official of any local government, collected Westinghouse's

1973 taxes. Such taxes were paid into the State Treasury, and not to the local government treasury. The collection of Westinghouse's 1973 taxes therefore falls within the clear language of the 1974 Act.

Section 67-4-719 deals with the collection of delinquent Business Taxes and provides, at Subsection (c), as follows:

> (c) If the county clerk in the case of counties and the proper city tax collector in the case of municipality fails to collect the tax, interest, and penalty from any delinquent taxpayer, then it shall be the duty of the commissioner at any time after the tax has become delinquent for more than six (6) months to collect the tax, penalty and interest from any delinquent taxpayer in accordance with the procedure specified in chapter 1, part 14 of this title. (Emphasis supplied.)

Section 67-4-719(d) provides:

> (d) Any tax, penalty and interest collected from a delinquent taxpayer by the commissioner under chapter 1, part 14 of this title shall be allocated to the state and paid into the state treasury. (Emphasis supplied.)

Sections 67-1-1401, et seq., referred to in §67-4-719(c) and (d), codify the Tax Enforcement Procedures Act ("TEPA"). As this Court has recognized, TEPA was enacted so as to modernize, reorganize and make systematic the procedures for the collection of state taxes. Barrow v. Tennessee Dep't of Revenue, 647 S.W.2d 232 (Tenn. 1983); see also T.C.A. §67-1-1402(b) (legislative purpose is to supplement and clarify existing provisions "relating to the enforcement of state taxes").[1]

The procedures set out in TEPA were applied by the Commissioner in the State's collection of Westinghouse's 1973 taxes. Demand for the payment of such taxes was

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[1] TEPA creates a lien in favor of the State in the amount of the delinquent taxes, T.C.A. §67-1-1403, and grants to the Commissioner broad enforcement and collection powers. T.C.A. §§67-1-1401, et seq.

made by the Commissioner on Westinghouse, (Trans. 110), and the taxes were paid to the Department of Revenue (see T.R. Stipulation Nos. 5 and 6) for deposit into the State Treasury. The taxes and interest paid by Westinghouse attributable to the 1973 tax year were collected by the State, and they were collected for the State. Thus, even if §67-1-1501(b) applied only to the assessment of State taxes, that section applied to the assessment of Westinghouse's 1973 taxes.

The 1974 Act barred the collection of any taxes unless such taxes were assessed within three (3) years of the December 31 of the year in which the return was filed. Westinghouse's 1973 tax return was filed in 1974 (see T.R. Stipulation No. 9); accordingly, the three-year limitations period of the 1974 Act began to run on December 31, 1974. The Commissioner failed to assess additional taxes against

Westinghouse before December 31, 1977.[2] Accordingly, Westinghouse requests that the Court grant a rehearing on this issue and determine that the Commissioner's collection of additional business taxes from Westinghouse for 1973 was barred by §67-1-1501(b).

II. Application of the Statute of Limitations to the 1972 Year -- Westinghouse Submits that the Court's Opinion is in Conflict With the Language and Purpose of T.C.A. §67-1-1501(a)

The Court interpreted T.C.A. §67-1-1501(a) as an ordinary statute of limitations by determining that the six-year limitations period applicable to Westinghouse's 1972 taxes did not begin to run until a cause of action accrued for the collection of such taxes. Westinghouse respectfully submits that the Court's construction of §67-1-1501(a) is in conflict with the

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2 See Brief in Support of Appellant, at pp. 55-56.

plain language and the purpose of the statute.

Section 67-1-1501(a) begins the running of the six-year limitations period from the "first of January of the year for which such taxes accrued." (Emphasis supplied). It is fundamental that the words of a statute should be given their common and ordinary meaning. Worrall v. Kroger Co., 545 S.W.2d 736, 738 (Tenn. 1979). In particular, a revenue statute is to be given a fair construction and is not to be extended beyond the clear import of the language actually used in the statute. United Inter-Mountain Tel. Co. v. Moyers, 426 S.W.2d 177 (Tenn. 1968); Gallagher v. Butler, 378 S.W. 2d 161 (Tenn. 1964); Sloan v. City of Columbia, 144 Tenn. 197, 232 S.W. 663 (1921). The operative words of §67-1-1501(a) provide that the limitations period begins to run on the January 1 of the year "for which" the taxes

accrue. The statute makes no reference to the year in which a cause of action for the collection of the taxes accrues. The Court's construction of the statute ignores the clear language of the statute, and the Court has extended the meaning of the words of the statute beyond their common and ordinary meaning.

Section 67-1-1501(a) is not an ordinary statute of limitations. It does not begin to run from the time of the accrual of a cause of action. Undoubtedly, because state taxes are due and payable at various times during the year, the Legislature chose an easily recognizable starting date for the limitations period of the statute--January 1 of the year for which the taxes accrued. The starting date selected by the Legislature for the limitations period is totally unrelated to the accrual of the cause of action for the

collection of the taxes, or to the date when such taxes become due and payable.

It is not unusual for the Legislature to select a date unrelated to the time a cause of action accrues as the starting date for a limitations period. For instance, the ten (10) year limitations period applicable to products liability actions, set out in T.C.A. §29-28-103, begins to run not at the time an injury occurs (the traditional time that a cause of action accrues), but rather at the time the product was first purchased for use or consumption. In addition, the three (3) year statute of limitations applicable to certain types of medical malpractice actions, set out in T.C.A. §29-26-116, begins to run at the time the physician's negligent act or omission occurred, and not the time that the physician's negligence is discovered. Actions for negligence relating to improvements to real property

must be brought within four (4) years after substantial completion of the improvement, and not when any injury resulting from such negligence occurs or is discovered. T.C.A. §28-3-202.

Section 67-1-1501(a) is like each of these statutes. The starting date for the six (6) years limitations period of the statute has no relation to the time the cause of action for the collection of the taxes accrues. Instead, it begins to run on January 1 of the year for which the tax accrues. Even if the cause of action for the 1972 taxes did not accrue until March 1, 1973, as stated on page 14 of the Court's Opinion, the 1973 year is not the year "for which" the cause of action accrued - rather the cause of action accrued "for" the 1972 year. Accordingly, the six (6) year limitations period applicable to Westinghouse's 1972 taxes began to run on January 1, 1972, that is,

the first of January of the year "for which" the taxes accrued. The parties have stipulated that such taxes were not collected until January 17, 1978--after the six-year period prescribed by the statute had expired. T.R. Stipulation No. 5.

Accordingly, Westinghouse requests that the Court grant a rehearing on this issue and determine that the Commissioner's collection of additional taxes from Westinghouse for the 1972 year was barred by §67-1-1501(a).

III. The United States Constitution Prohibits the Application of the Business Tax to the Sales in Question--Westinghouse Respectfully Submits That the Court Improperly Placed the Burden of Showing Actual Multiple Taxation on Westinghouse

The Due Process and Commerce Clauses of the Federal Constitution mandate that a state tax applied to interstate commerce must be apportioned to activities carried on within the state. Northwestern State

Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) (Due Process); Gwin, White & Prince v. Henneford, 305 U.S. 434 (1939) (Commerce Clause). This Court recognized, at page 12 of its Opinion, that

> a tax not apportioned to the activities carried on within the state burdens interstate commerce the same as if the tax were on the privilege of engaging in interstate commerce. Gwin, White & Prince v. Henneford, 305 U.S. 435, 438-39, 59 S.Ct. 325, 327, 83 L.Ed. 272 (1939). Lack of apportionment risks multiple taxation, a risk not borne by purely local commerce. Id.

However, the Court, relying upon General Motors Corp. v. Washington, 377 U.S. 436 (1964), placed upon Westinghouse the burden of showing that it suffered from multiple taxation. Westinghouse submits that the Court applied an incorrect standard in addressing the multiple taxation issue and should reconsider this issue in light of the recent United States Supreme Court decision in Armco, Inc. v. Hardesty, 81

L.Ed.2d 540 (1984).[3]

In Armco, the Supreme Court considered the constitutionality of a West Virginia gross receipts tax imposed on persons engaged in selling tangible personal property at wholesale. Armco, a foreign corporation doing business in West Virginia, argued that the tax unconstitutionally burdened interstate commerce since local manufacturers were exempt from the tax. The State argued that the gross receipts tax did not discriminate against interstate commerce because local manufacturers were subject to a manufacturing tax imposed at a higher rate than the gross receipts tax rate. The Supreme Court, hypothesizing that multiple taxation would be imposed on interstate commerce if any other state imposed a similar manufacturing tax on its local

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[3] Armco was decided June 12, 1984, after briefs were submitted in the instant case.

manufacturers, concluded that the gross receipts tax and the manufacturing tax taken together demonstrated persistent discrimination against interstate commerce. The State had argued that Armco had the burden of proving that Armco had suffered some actual discriminatory impact by demonstrating that another state actually imposed a manufacturing tax on Armco such that Armco was subject to a total tax burden greater than that imposed on local manufacturers in West Virginia. The Court summarily rejected that test, however. The Court stated that the proper test was one of "'internal consistency--that is, the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade." Id. at 546.

Thus, the Armco Court changed the test for determining the validity of a state tax challenged as imposing the burden of

multiple taxation on interstate commerce. A taxpayer is no longer required to demonstrate that it in fact suffers from the burden of multiple taxation. Rather, the court must examine the tax statute itself and determine if the risk of multiple taxation on interstate commerce exists under the taxing scheme. The Armco Court reasoned:

> Any other rule would mean that the constitutionality of [a State's] tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated. Id. at 547.

The Supreme Court in Armco renews (See Id. at 547, n. 8) the position taken by the Court in a related context in Freeman v. Hewit, 329 U.S. 249 (1946). Freeman involved the constitutionality of a state gross income tax imposed on the proceeds of interstate sales. It was unsuccessfully

argued in Freeman that the constitutionality of the tax was dependent on a showing of actual multiple taxation:

> If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a state can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce. Id. at 256. (Emphasis added.)

In its Opinion, at page 12, this Court cited with favor the Supreme Court's decision in Gwin, White & Prince v. Henneford, supra. In Gwin, the Supreme Court invalidated a Washington gross receipts tax as an unconstitutional burden

on interstate commerce. The Gwin Court opined that the statute was constitutionally flawed because

> if Washington is free to enact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. Id. at 439.

Thus, the Gwin Court held the tax unconstitutional because of the risk of the burden of multiple taxation, not the actuality of multiple taxation. The Court stated:

> Unlawfulness of the burden depends on its nature measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden. Id. at 440. (Emphasis added.)

Thus, Armco articulates the appropriate test for determining the constitutionality of a state tax which is challenged on the basis of imposing the burden of multiple taxation on interstate

commerce. A taxpayer need no longer show that it is actually subject to multiple taxation, only that the tax in question lacks "internal consistency" such that if a similar tax were imposed by other states, there would be an unconstitutional interference with interstate commerce. Pursuant to Armco, should the application of a particular state tax involve the risk of multiple taxation on entities which engage in interstate commerce, then the state tax is unconstitutional.

In the instant case, it is undisputed that title to all equipment sold by Westinghouse passed to TVA outside the State of Tennessee at Westinghouse's manufacturing facilities in Florida and Pennsylvania. Thus, a "sale", as defined by T.C.A. §67-4-702(a)(12), occurred in Florida or Pennsylvania. (Trans. 31-36, 82-83) If Pennsylvania and Florida elected

to tax the proceeds from the sales that occurred within their territorial limits under a tax similar to the Tennessee Business Tax, Westinghouse would be exposed to the risk of multiple taxation on such sales. Under the rationales of Armco, Freeman and Gwin, the risk of multiple taxation on such interstate sales is constitutionally impermissible. Therefore, the Tennessee Business Tax is unconstitutional as applied to the Westinghouse sales in question.

This Court cited General Motors Corp. v. Washington, supra, and Standard Pressed Steel Co. v. Washington, 419 U.S. 560 (1975), as authority for sustaining the Tennessee Business Tax Act against a constitutional attack on apportionment grounds. However, because these cases improperly required the taxpayer to show actual multiple taxation, in light of the Armco decision, these cases no longer

provide authority for this Court's Judgment. Westinghouse, therefore, requests this Court to grant a rehearing on this issue and to determine that the Business Tax is unconstitutional as applied to the Westinghouse sales in question.

IV. Westinghouse Respectfully Submits that The Court's Contruction of T.C.A. §67-4-702(a) Conflicts With the "Internal Consistency" Principle Articulated in Armco Inc. v. Hardesty and Violates Rules of Statutory Construction.

The Armco decision dictates that a state tax imposed on interstate commerce, to be constitutionally valid, must be "internally consistent," such that if a similar statute were applied by another state to the same transaction, the taxpayer would not run the risk of multiple taxation. 81 L.Ed.2d at 546.

In its Opinion, this Court, in construing T.C.A. §67-4-702(a)(12), stated:

> Although subsection [(a)(12)] defines a sale as including, inter alia, a

> transfer of title, it does not place any significance on the place of transfer of title. Indeed, we find no explicit language in this subsection or the remainder of the Act limiting the tax to transfers within the state. Opinion, p. 7.

Westinghouse submits, however, that a territorial limitation on the sale is implicit in the constitutional restrictions embodied in the principle of internal consistency, and that §67-4-701(c) mandates that Subsection (a)(12) must be construed as to reflect this constitutional limitation.[4]

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[4] T.C.A. §67-4-701(c) provides as follows:

> It is the legislative intent, within the framework of this part, to recognize that there are limitations upon state taxation imposed by the Constitution of the United States and this state and not to impose the tax where prohibited therein; but it is intended to impose the tax to the extent permitted under such constitutions and the words of imposition used herein.

Also, Business Tax Rule 12(a)(7) prohibits the taxation of interstate commerce.

Section 67-4-702(a)(12) defines a sale by alternative events, including "the transfer of title or possession, or both." The wording of the statute is unambiguous, and it is clear that the transfer of title and the transfer of possession may operate independently to effect a "sale" under the Act.[5]

The Court found that the transfer of title outside of Tennessee is irrelevant, since the transfer of possession occurred in Tennessee, Opinion p. 13, and concluded that the intrastate transfer of possession was sufficient to subject the transaction to the Business Tax. Such a holding is in clear conflict with the internal consistency rule of Armco.

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5 Subsection (a)(12) states further that the transfer of possession with the retention of title by the seller as security is deemed a sale, which is a clear indication that either of the two transfers would constitute a "sale" subject to the Business Tax.

In Westinghouse's sales to TVA, it is undisputed that the transfer of title to TVA occurred in either Florida or Pennsylvania. If either of those states were to apply tax statutes similar to the Tennessee Business Tax Act, which defines a "sale" as either the transfer of title or the transfer of possession, under this Court's interpretation, taxable events would occur both in Tennessee and in Pennsylvania or Florida. The same transaction would therefore be subject to taxation in more than one state. Such multiple taxation is unconstitutional under the rationale of Armco.

This Court's construction of §67-4-702(a)(12) also violates well established rules of statutory construction. A revenue statute must be given a fair construction and not be extended by implication beyond the clear impact of the language used in the statute.

United Inter-Mountain Tel. Co. v. Moyers, supra; Gallagher v. Butler, supra; Sloan v. City of Columbia, supra. A statute must be construed as a whole, giving effect to each word, and the Court must assume that the Legislature used each word in the statute purposely and the use of the word conveyed some intent and had a meaning and purpose. Bob Arum Enterprises v. Tennessee Athletic Comm'n, 633 S.W.2d 307, 309 (Tenn. 1982). The Court must construe a statute so that no part will be inoperative, superfluous, void or insignificant, and must give effect to every word, clause and sentence of a statute in order to carry out the legislative intent. Tidwell v. Collins, 522 S.W.2d 674 (Tenn. 1975); City of Caryville v. Campbell County, 660 S.W.2d 510 (Tenn. App. 1983).

In its Opinion, the Court stated that the place where title is transferred is not significant in applying the statute,

Opinion, p. 7, and found that the transfer of possession in Tennessee, after the transfer of title had already occurred outside the state, is a taxable event sufficient to subject the sale to the Business Tax, Opinion, p. 13. This construction of the statute essentially makes the transfer of possession the critical event determining the taxability of a sale. The Act, however, places the transfer of title and transfer of possession on equal footing in defining when and where a "sale" occurs. Accordingly, the Court's construction is contrary to the clear wording of the statute and improperly extends the statute by implication beyond the clear import of its language.

Moreover, the Legislature included both terms (that is -- title and possession) in the statute with the intent

that each serve a purpose, and this Court must give effect to both of the terms. By ignoring the fact that under Subsection (a)(12) a transfer of title alone can constitute a "sale," the Court's construction of Subsection (a)(12) makes the transfer of title portion of the definition of a "sale" inoperative and superfluous.

In order to be "internally consistent" and thus, constitutional, a "sale" for purposes of the Business Tax must be construed as either the transfer of title or the transfer of possession, whichever first occurs. A subsequent transfer of title or transfer of possession must not be deemed to constitute a taxable event. Since the transfer of title in this case occurred first, and such transfer took place outside this State, the sales in this case were not subject to the Business Tax.

Westinghouse accordingly requests that the Court grant a rehearing on this issue and determine that the sales in this case were not subject to the Tennessee Business Tax Act.

CONCLUSION

For the foregoing reasons, Westinghouse submits that the Court's Judgment and Opinion announced on September 10, 1984, is in conflict with controlling statutory law and overlooks and misapprehends controlling decisions of the United States Supreme Court. Accordingly, Westinghouse requests this Court to grant this Petition to Rehear to the end that said Judgment and Opinion be set aside and

that the Circuit Court's holding in this case be reversed.

Respectfully submitted,

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APPENDIX I

Constitutional and Statutory Provisions

The following constitutional and statutory provisions are cited in this Jurisdictional Statement:

I

United States Constitution, Article I, Section 8, Clause 3 (the "Commerce Clause"):

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.

II

United States Constitution, 14th Amendment (the "Due Process Clause"):

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

III

Tennessee Code Annotated, §§ 67-5801, et seq. (presently Tenn. Code Ann. §§ 67-4-701, et seq.):

§ 67-5801. Business Tax Act--Scope.--This chapter shall be known as the

Business Tax Act and the taxes imposed by this chapter shall be in addition to all other privilege taxes. It is the legislative intent that the taxes imposed by this chapter shall be in lieu of any or all ad valorem taxes on the inventories of merchandise held for sale or exchange by persons taxable under this chapter, from and after January 1, 1973 or such other time as said in lieu of tax may be constitutionally validated.

§ 67-5802. Privileges affected for local taxation.--Subject to the requirements set forth in §§ 67-5823--67-5826 relative to the amount of tax required to be forwarded to the state, the making of sales by engaging in any vocation, occupation, business or business activity enumerated, described or referred to in § 67-5805, classification 1, classification 2, and classification 3 is declared to be a privilege upon which

each county and/or incorporated municipality in which said business, business activity, vocation, or occupation is carried on may levy a privilege tax in an amount not to exceed the rates hereinafter fixed and provided. Subject to the requirements set forth in §§ 67-5823--67-5826 relative to the amount of tax required to be forwarded to the state, the engaging in any vocation, occupation, business or business activity enumerated, described or referred to in § 67-5805, classification 4, is declared to be a privilege upon which each county and/or incorporated municipality in which said business, business activity, vocation, or occupation is carried on may levy a privilege tax in an amount not to exceed the rate hereinafter fixed and provided. Provided, however, that any county where metropolitan government prevails the general services district

shall constitute the county and the urban services district, as well as any incorporated towns therein, shall constitute the municipalities insofar as this chapter is concerned. Each county and/or incorporated municipality may reduce the rates of taxation set forth in § 67-5806 for any or all classifications taxable by such county and/or incorporated municipality. Every person taxable under this chapter shall prior to engaging in business as defined in § 67-5804 register with the county court clerk in the case of taxes owed to the county and to the city official designated as the collector of tax by city charter or ordinance in the case of taxes owed to a municipality.

No county, municipal, or metropolitan government shall have the authority to levy any regulatory fee, inspection fee, or special tax or fee of any type or kind on beer as defined in subsection (b) of

§ 57-302, at either wholesale or retail, except as authorized by this chapter, and by chapter 30 of this title (city and county retail sales tax).

§ 67-5803. Privileges affected for state taxation.--The engaging in any business, business activity, vocation or occupation hereinafter named, enumerated, described, or referred to in § 67-5805, classification 5, is declared to be a privilege for state purposes and taxable by the state alone.

§ 67-5804. Definitions.--The following words, terms, and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except when the context clearly indicates a different meaning:

(a) "Person" includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, or

other group or combination acting as a unit, and the plural as well as the singular number.

(b) "Sale" means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional, or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration, and includes the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrication work, and the furnishing, repairing or servicing for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property.

A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price shall be deemed a sale.

"Sale" includes the furnishing of any of the things or services taxable under this act.

"Sale" shall not include the transfer of tangible personal property from a wholesaler to another wholesaler or from a retailer to another retailer where the amount paid by the transferee to the transferor does not exceed the transferor's cost including freight in and storage costs, and transportation costs incurred in the transfer from the transferor to the transferee.

(c) "Retail sales" or "sale at retail" means a sale of tangible personal property or services rendered to a consumer or to any person for any purpose other than for resale, and shall mean and include all such transactions as the commissioner upon investigation finds to be in lieu of sales; provided, that sales for resale must be in strict compliance

with rules and regulations. Any person making a sale for resale which is not in strict compliance with rules and regulations shall himself be liable for and pay the tax.

The term "sale at retail," shall not include the sale of industrial materials for future processing, manufacture or conversion into articles of tangible personal property for resale where such industrial materials become a component part of the finished product.

The term "sale at retail" or "retail sales" shall include the sale by a retailer of tangible personal property to other than a user or consumer thereof if said sales do not exceed twenty per cent (20%) of total gross sales.

(d) "Wholesale sale" or "sale at wholesale" shall mean the sale of tangible personal property or services rendered in the regular course of business to a

licensed retailer for resale, lease, or rental as tangible personal property in his regular course of business to a user or consumer. The quantity of property sold or the price at which the property is sold is immaterial in determining whether or not the sale is at wholesale.

The term "wholesale sale" or "sale at wholesale" shall include the sale by a wholesaler of tangible personal property to other than a licensed retailer if said sales do not exceed twenty per cent (20%) of total gross sales.

The term "wholesale sale" or "sale at wholesale" shall include the sale of industrial materials for future processing, manufacture or conversion into articles of tangible personal property for resale where such industrial materials become a component part of the finished product. Provided, however, that the provisions of this section shall not apply

to raw or unprocessed agricultural products.

The term "wholesale sale" or "sale at wholesale" shall include the sale by a wholesaler of tangible personal property to the state of Tennessee or any county or municipality or subdivision thereof or the sale to any religious, educational or charitable institution as defined in § 67-3014.

(e) The term "gross sales" means the sum total of all sales under this chapter as defined herein, without any deduction whatsoever of any kind or character, except as provided in this chapter.

(f) "Sales price" means the total amount for which tangible personal property or services rendered is sold, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the

purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, losses, or any other expense whatsoever; provided, that the term "sales price" shall not include any additional consideration given by the purchaser for the privilege or making deferred payments regardless of whether such additional consideration shall be known as interest, time price differential on conditional sales contracts, carrying charges or any other name by which it shall be known.

(g) "Lease or rental" means the leasing or renting of tangible personal property and the possession or use thereof by the lessee or renter for a consideration, without transfer of the title of such property.

(h) "Business" includes any activity engaged in by any person, or caused to be

engaged in by him, with the object of gain, benefit, or advantage, either direct or indirect. The term "business" shall not be construed in this chapter to include occasional and isolated sales or transactions by a person who does not hold himself out as engaged in business.

(i) "Tangible personal property" means and includes personal property, which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses. The term "tangible personal property" shall not include stocks, bonds, notes, insurance, or other obligations or securities.

(j) "Fabricating or processing tangible personal property for resale" shall include only tangible personal property which is fabricated or processed for ultimate use or consumption off the

premises of the one engaging in such fabricating or processing.

(k) "Retailer" means and includes every person engaged in the business of making sales at retail.

(l) "Dominant business activity" means the business activity which is the major and principal source of gross sales at retail and the major and principal source of gross sales at wholesale of the business.

(m) "Wholesaler" means and includes any person engaged in the business of making wholesale sales or sales at wholesale.

(n) Except as otherwise provided in this act, the term "commissioner" means and includes the commissioner of revenue of the state of Tennessee, or his duly authorized assistants.

(o) Except as otherwise provided in this act, the term "department" means the

department of revenue of the state of Tennessee.

(p) The term "services" means and includes every activity, function, or work engaged in by a person for profit or monetary gain except as otherwise provided in this chapter. The term "services" shall not include sales of tangible personal property.

§ 67-5805. Classifications.--Businesses, vocations and occupations which are taxable are set forth in the following classifications: Provided, however, that each person shall be classified according to the dominant business activity.

CLASSIFICATION 1.

***

CLASSIFICATION 2.

Each person engaged in the business of making sales of the following:

(f) Tangible personal property not specifically enumerated or described elsewhere in this chapter.

***

CLASSIFICATION 3.

***

CLASSIFICATION 4.

***

CLASSIFICATION 5.

***

§ 67-5806. Privileges taxable-Rates.-- For the exercise of the privileges described or enumerated in § 67-5805, a minimum tax of fifteen dollars ($15.00) shall be payable by each person for each place, location or outlet from which business is carried on . . .

(1) Persons described or enumerated in classification 5 shall pay a minimum tax as set forth below in subsection (e) of this section.

(2) In the case of coin operated machines, only the principal place of business shall be subject to the minimum tax.

(3) No person engaged solely in the business of soliciting orders for merchandise or making contracts for the future delivery of the same in sale to the ultimate user or consumer of such merchandise nor persons peddling merchandise on a part-time basis shall be subject to the minimum tax.

(4) Persons described in subsection (a) of classification 4 of § 67-5805, who, during any taxable period, receive less than fifty thousand dollars ($50,000) of compensation from contracts in a county or incorporated municipality, other than the county or incorporated municipality where domiciled or located, shall not be required to pay the minimum tax: Provided, however, that such persons shall

be required to pay a minimum tax in the county and/or incorporated municipality where domiciled or located.

In addition to the minimum tax, persons shall pay a tax, according to the dominant business activity of such persons as follows:

(a) Classification 1 of § 6705805.

One-fifteenth (1/15) of one per cent (1%) of all the retail sales of the business.

One-sixtieth (1/60) of one per cent (1%) of all the wholesale sales of the business by persons classified under subsection (a) of classification 1 of § 67-5805.

One-fortieth (1/40) of one per cent (1%) of all the wholesale sales of the business by persons classified under subsections (b) and (c) classification 1 of § 67-5805.

(b) Classification 2 of § 67-5805.

One-tenth (1/10) of one per cent (1%) of all the retail sales of the business.

One-fortieth (1/40) of one per cent (1%) of all the wholesale sales of the business.

(c) Classification 3 of § 67-5805.

One-eighth (1/8) of one per cent (1%) of all the retail sales of the business.

One-fortieth (1/40) of one per cent (1%) of all the sholesale sales of the business.

(d) Classification 4 of § 67-5805.

One-fifteenth (1/15) of one per cent (1%) of the compensation entitled to under the contract, whether in the form of a contract price, commission, fee or wage, by the persons enumerated in item (a) of such classification. Persons who, during any taxable period, receive less than fifty thousand dollars ($50,000) of compensation from contracts in a county

and/or incorporated municipality other than the county or incorporated municipality where domiciled or located, shall be required to pay a tax on such compensation at the rate of one-fifteenth (1/15) of one per cent (1%) in the county and/or incorporated municipality where domiciled. In computing the measure of the tax, except as hereinafter provided, no deduction will be allowed on account of the cost of tangible property sold, the cost of materials used, labor cost, reimbursed cost, interest, discount, delivery cost, taxes, or no other expense whatsoever paid or accrued and without any deduction on account of losses.

One-fifteenth (1/15) of one per cent (1%) of the gross commissions, margins, fees, or other charges by the persons enumerated in item (b) of such classification.

The amount amd rates of taxation set forth in subsections (a), (b), (c), and (d) above are subject to the requirements set forth in §§ 67-5823 - 67-5826 relative to the amount of tax to be forwarded to the state by each county and/or incorporated municipality.

(e) Classification 5 of § 67-5805.

One-fifth (1/5) of one per cent (1%) of the gross income of the business.

Provided, however, that such persons shall pay a minimum tax of three hundred dollars ($300) per annum except, however, that in no instance shall the minimum tax paid pursuant hereto be less than that sum of the taxes paid to all levels of government in the taxable year 1970-71 under the laws being repealed by chapter 387 of Acts 1971; except, however, under no circumstances shall the tax payable hereunder be more than one thousand dollars ($1,000) per annum. Gross income

of the business means all interest income, earned discounts, earned lease rentals, commission fees exclusive of insurance commissions, past-due charges, contract earnings or charges, collection charges, loan service fees, late fee income, and all other income, without any deduction except as hereinafter provided. [Acts 1971, ch. 387, § 6; 1972(Adj. S.), ch. 850, § 6.]

§ 67-5807. Payment of the taxes under this chapter.--The minimum tax per annum for each location or outlet, imposed under the provisions of § 67-5806, shall be due and payable by all persons taxable under this chapter on the following dates:

***

§ 67-5808. Delinquent taxes--Distress warrant.--

***

§ 67-5809. Specific penalties for failure to pay required tax.--

***

§ 67-5810. Method of computing tax.--In computing tax, there may be deducted from the measure of tax the following items: (a) cash discounts allowed and taken on sales, (b) the proceeds of the sale of goods, wares, or merchandise returned by the customer when the sale price is refunded either in cash or by credit, (c) the amount allowed as trade-in value for any article sold, (d) amounts representing the difference between the remaining amount due on the selling price of tangible personal property sold on a secruity agreement and five hundred dollars ($500), when the wholesaler or retailer actually repossesses the property sold pursuant to the terms of the security agreement, (e) amounts subcontracted or amounts agreed to be paid to other persons for constructing, building, erecting, repairing, grading, excavating, drilling, exploring, testing,

or adding to any building, highway, street, sidewalk, bridge, culvert, sewer, irrigation or water system, drainage, or dredging system, levee or levee system or any part thereof, railway, reservoir, dam, power plant, electrical system, air conditioning system, heating system, transmission line, pipe line, tower, dock, storage tank, wharf, excavation, grading, water well, any other improvement of structure or any part thereof, (f) federal excise taxes and state privilege and excise taxes on gasoline, motor fuel and tobacco products and the inspection fees on volatile oils levied by chapter 4 of title 60, (g) the $9.00 per barrel federal tax, the $3.40 per barrel state tax as authorized by §57-213, and the city and county 17% wholesale tax as authorized by §57-303, on beer as defined in subsection (b) of §57-302, (h) sales of services substantially performed in other states.

§ 67-5811. Exemption from payment of tax relative to blind persons and disabled veterans.--

***

§ 67-5812. Exempt entities.--This chapter shall not apply to the following persons in the circumstances indicated:

(a) Any person in respect to his employment in the capacity in an employee or servant as distinguished from that of an independent contractor.

(b) Any person primarily engaged in the manufacture of goods, wares, merchandise or other articles of value from a location or outlet subject to ad valorem taxation under the provisions of chapter 6 of this title.

(c) Any person operating vending machines within the meaning of Item 65(c) of §67-4203 who exercises the option of paying the gross receipts tax provided for

in said Item 65(c)(1), with respect to receipts taxable under said provisions.

(d) Any person taxable under the provisions of chapter 41 of this title with respect to receipts taxable under said provisions.

(e) Newspaper route carriers and newspaper peddlers.

§ 67-5813. Farm products--Method of sale determining factor.--

***

§ 67-5814. Credits allowable.--The following credits may be taken by persons filing and paying tax imposed by this chapter:

(a) For persons filing returns and paying taxes due under this chapter, and pro rata portion of any privilege tax paid under any provisions of chapter 2 of title 57, or chapters 41, 42, 45, 46, 48, 49, 50 and 51 of this title, extending past June 1, 1971 and repealed as of said date.

Provided, however, the credits authorized under this subsection may not be carried forward beyond November 30, 1972 by persons taxable under classifications 1 and 4, December 31, 1972 by persons taxable under classification 2, and April 30, 1973 by persons taxable under classification 3;

(b) The minimum tax actually paid;

(c) Except as otherwise provided in subsection (d) seven twelfths (7/12) of the personal property taxes paid for 1971, as a result of assessments made under the provisions of §67-601, et seq., and/or as a result of assessments made on inventories held for sale or exchange by persons taxable under such sections, if paid for the entire year of 1971; for each year subsequent to 1971, personal property taxes paid as a result of assessments made under the provisions of §67-601, et seq., and/or as a result of assessments made on

inventories held for sale or exchange by persons taxable under the provisions of such sections; and

(d) In cases where a lease or rental agreement provides specifically for payment of personal property taxes by the lessee or renter to the lessor or owner, personal property taxes paid by the lessee or renter to the lessor or owner covering any period of time extending beyond June 1, 1971, arising from assessments referred to in subsection (c) above and made against the lessor or owner.

Provided, however, the credit authorized in this subsection to the lessee or renter may not be taken by the lessor or owner.

Provided, however, that the sum of the credits allowable under subsection (b) and (c) of this section may not exceed the amount owed from applying the prescribed tax rate against the measure of the tax.

Provided further, however, that the credit authorized in subsection (c) of this section is allowable only on returns filed with, and taxes paid to, each respective governmental entity to which personal property taxes are paid as a result of assessments made under the provisions of §67-601, et seq.

Any unused credit authorized in subsection (c) above may be carried forward and taken as a credit until November 30, 1974 by persons taxable under classifications 1 and 4; until December 31, 1974 by persons taxable under classification 2; and until April 30, 1975 by persons taxable under classification 3.

In permitting or allowing credits to be taken in accordance with this section, responsible local governmental unit collectors shall use county and/or incorporated municipality records to determine if personal property taxes

claimed as a credit have actually been paid. No credit shall be disallowed by any local governmental unit official or collector solely as a result of the taxpayers failure to produce a written receipt or document evidencing payment from the applicable county and/or incorporated municipality.

The amount of any credit allowable under this section but not permitted or allowed by any local governmental unit official shall be refunded by the responsible, appropriate local governmental unit official to each person to whom the credit has not been properly permitted or allowed. It shall be the duty of responsible, appropriate local governmental unit officials to furnish proper claim forms and to refund to each person the amount of any credit which has been disallowed. If the appropriate local

governmental unit official shall fail to make a refund in accordance with this paragraph within six (6) months of the delinquency date for any person taxable under this chapter, then the commissioner shall notify the state treasurer of the amount of refunds not made by the appropriate local governmental unit official. Upon receiving notification from the commissioner, the state treasurer shall withhold and transfer to an appropriate account from any amount due such local governmental unit by the state a sufficient amount to cover the amount of refunds not made by appropriate local governmental unit officials. From such amounts withheld by the state treasurer, the commissioner shall then refund, in accordance with prescribed procedures, to each person the amount for which each person has not been allowed credit and has

not been refunded by appropriate local governmental unit officials.

§ 67-5815. Final return and payment - Liability of purchaser.--

***

§ 67-5816. Books and records required - Disclosure of information.--

***

§ 67-5817. Examination by commissioner of revenue - Effect.--

***

§ 67-5818. State moneys allocated to general fund.--

***

§ 67-5819. License - Issuance - Exhibition.--

***

§ 67-5820. Legislative intent - Constitutional limitations acknowledged.-- It is the legislative intent, within the framework of this chapter, to recognize that there are limitations upon state

taxation imposed by the Constitution of the United States and of this state and not to impose the tax where prohibited therein; but it is intended to impose the tax to the extent permitted under such constitutions and the words of imposition used herein.

§ 67-5821. Cosignee, bailee, factor or auctioneer deemed seller - Exception.--

***

§ 67-5822. Rule-making power of the commissioner of revenue.--The commissioner is authorized to prescribe all rules and regulations necessary for the administration of this chapter, and for the collection of the taxes thereby imposed. Rules and regulations not inconsistent with said chapter when promulgated by the commissioner, and approved by the attorney-general, shall have the force and effect of law. A copy

of all such rules and regulations shall be furnished every collector in printed form, and shall be furnished any taxpayer upon request.

§ 67-5823. Payments to commissioner.--

***

§ 67-5824. Records and reports of collectors.--

***

§ 67-5825. Time for payments and reports by collectors.--

***

§ 67-5826. Late payment by collectors - Penalty - Interest.--

***

§ 67-5827. Designation of department of revenue as collector.--

***

§ 67-5828. Exemption where sales under $500.--

***

§ 67-5829. Traveling photographers.--

***

APPENDIX J

List of Related Companies

Pursuant to Rule 28.1 of the Rules of the Supreme Court, the following list includes all subsidiaries and affiliates of Appellant Westinghouse Electric Corporation ("Westinghouse") other than wholly-owned subsidiaries and affiliates of Westinghouse (of which there are over one hundred). Westinghouse has no parent company.

Domestic Subsidiaries and Affiliates

CATV Enterprises, Inc.
El Paso Cablevision, Inc.
Focus Cable of Oakland, Inc.
Group W Cable of Lorain County, Inc.
Group W Cable of St. Bernard, Inc.
Group W Cable of North Central Chicago, Inc.
Group W Cable of Northwest Chicago, Inc.
Grosse Point Cable, Inc.
Kaiser-Teleprompter of Hawaii, Inc.
Piedmont Cablevision, Inc.
Sifco Turbine Component Services
Siliconix, Inc.
Southwest Video Corporation
Sutro Towers, Inc.
Telecom Cablevision, Inc.
Teleprompter of Columbia Heights/ Hilltop, Inc.

Teleprompter of Denver, Inc.
Teleprompter of Erie, Inc.
Television Tower Inc.

Foreign Subsidiaries and Affiliates

Ateliers de Constructions Electriques de Charlerol, S.A.
CDSW Ireland Limited
CEMAC Westinghouse PTY Limited
China Industry Services Co., Ltd.
Compagnie des Dispositifs Semiconducteurs Westinghouse
Electrolink, Inc.
Eletromar Industria Eletrica Brazileira, S.A.
Eletromar Nordeste, S.A.
Eletroncontroles Villares, Ltda.
Funktionelle Musik GMBH
Galileo La Rioja, S.A.
Galileo Uruguaya, S.A.
IEM S.A.
Industrias Electronicas, S.A.
Industry Services Company of Saudi Arabia, Ltd.
Korea Industry Services Company, Ltd.
Living & Learning (Cambridge), Ltd.
Metzenhauer & Jung, GMBH
Mex-Control, S.A. de C.V.
Mitsubishi Nuclear Fuel Co., Ltd.
Silectra, S.A. de C.V.
Transformadores de Distribucion, S.A.
Transformadores TPL S.A.
Tyree Industries Limited
Tyree-Power Construction Limited
Westinghouse Canada Inc.
Westinghouse Asia Control Corp.
Westinghouse Electric Supply Company of Saudi Arabia

Westinghouse Electro Metalurgicas C.A.
Westinghouse, S.A.
Westralian Transformers PTY Limited

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No. 84-1155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WESTINGHOUSE ELECTRIC CORPORATION,
Appellant,

vs.

JOHN F. KING, Commissioner of Revenue,
State of Tennessee,
Appellee.

On Appeal From The Supreme Court of Tennessee

MOTION TO DISMISS OR AFFIRM

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COUNTER-STATEMENT of the QUESTION PRESENTED

Whether a business and occupation tax measured by gross receipts is properly apportioned when it only includes gross receipts from sales made through the taxpayer's offices in Tennessee to Tennessee customers?

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JOHN F. KING, Commissioner of Revenue,
State of Tennessee,
Appellee.

On Appeal From The Supreme Court of Tennessee

MOTION TO DISMISS OR AFFIRM

COMES NOW the Appellee, John K. King, Commissioner of Revenue, State of Tennessee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, and respectfully moves that this Court dismiss the appeal, or, in the alternative, affirm the judgment below, on the grounds that it does not present a substantial federal question, the decision of the state court is in accord with applicable decisions of this Court, and there are no special or important reasons warranting briefs on the merits and oral arguments.

OPINION BELOW

The opinion of the Supreme Court of Tennessee, filed September 10, 1984, is reported at 678 S.W.2d 19 (Tenn. 1984) and is reproduced in the Appendix to the Jurisdictional Statement, pp. A-1 to A-33.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statement of constitutional and statutory provisions involved contained in the Jurisdictional Statement is adequate.

STATEMENT OF THE CASE

Dissatisfied with Appellant's statement of the case, the Appellee offers the following counter-statement:

During the years in question, Westinghouse Electric Corporation, a Pennsylvania corporation, did business in Tennessee through marketing offices and manufacturing facilities. Westinghouse had a marketing team in its Chattanooga and Knoxville offices which solicited business from the Tennessee Valley Authority (TVA).

In 1968, 1970 and 1971, bids by Westinghouse for the Watts Bar and Sequoyah Nuclear Plants of TVA were submitted by the Chattanooga offices of Westinghouse to TVA's offices in Chattanooga. Westinghouse's bids were accepted by TVA and under these contracts Westinghouse was required to design, fabricate, furnish and sell the nuclear steam supply systems for the two plants and the turbo-generators for these plants.

Westinghouse was required pursuant to its contracts to work with TVA to provide a nuclear power system which was current in design and in accord with nuclear regulatory standards.

The performance of the contracts extended over a period of ten to twelve years. Because of technological developments and

changes in requirements by TVA, there were several hundred change orders in the contracts. These change orders were handled through Westinghouse's Chattanooga office. Westinghouse's Chattanooga office had the sales responsibility for the contracts and coordinated the performance of the contracts with all other Westinghouse divisions. The proceeds from TVA payments were credited to the performance of the Chattanooga office.

Although most of the equipment was installed by TVA, Westinghouse was required to provide technical direction for the installation and start up of equipment. Westinghouse maintained offices at each plant site for its technical personnel and also maintained offices to assist Westinghouse in the timely completion of its responsibilities under the contracts. The purpose of maintaining these offices was to insure that the equipment was installed as designed in order to protect Westinghouse's investment.

Westinghouse also made loans to TVA of special equipment needed for the installation and starting up of the plants. Westinghouse had some of its personnel perform work on changes in the windings of the generators at the plant sites. Westinghouse also hired subcontractors to do some work at the plant sites to change or replace some defective materials.

The equipment was manufactured or purchased by Westinghouse outside Tennessee. Under the contracts TVA was required to make progress payments as Westinghouse built each phase of the custom designed equipment. The contracts provided that title would pass to TVA when a progress payment was made for a piece of equipment or on completion of a phase of equipment. Retainage of 10% was withheld until the units were in commercial operation. According to the contracts, Westinghouse retained the risk of loss until the equipment was delivered to TVA in Tennessee.

Westinghouse did not report the receipts from the sales of this equipment to TVA in its business tax returns in the years in question and in 1977 the Department of Revenue assessed additional business taxes. Westinghouse paid these taxes under protest and brought timely suit for recovery.

Westinghouse claimed at the trial level that it exercised no taxable privilege under the Business Tax Act but that if it did, the Business Tax Act violated the Due Process and Commerce Clauses of the United States Constitution. A statute of limitations question was also raised but is not relevant to the proceedings here. The Trial Court, after hearing the proof, held for the Commissioner of Revenue.

In affirming the Trial Court's ruling, the Tennessee Supreme Court unanimously held that Westinghouse exercised the taxable privilege of doing business in Tennessee as established in the Business Tax Act, T.C.A. §§ 67-4-701 et seq. The Court found Westinghouse's activities in Tennessee were more substantial than the taxpayer contacts in either *General Motors Corp. v. Washington,* 377 U.S. 436 (1964) or *Standard Pressed Steel Co. v. Washington Dept. of Revenue,* 419 U.S. 560 (1975) and these activities provided sufficient nexus to support the imposition of the tax.

The Court also found that the tax was properly apportioned because it was measured by sales proceeds from sales through Westinghouse's Tennessee offices to a Tennessee customer. The Court cited this Court's decision in *Standard Pressed Steel* where it was concluded that the challenged business and occupation privilege tax which was measured by sales to a Washington customer was " 'apportioned exactly to the activities taxed,' all of which are intrastate." 419 U.S. at 564. The Tennessee Supreme Court noted that Westinghouse did not establish that its Tennessee activities were not decisive factors in establishing and holding its Tennessee market.

REASONS FOR DISMISSING THE APPEAL OR, IN THE ALTERNATIVE, AFFIRMING THE JUDGMENT BELOW

Since the decision of the Tennessee Supreme Court is correct and conflicts with no decision of this Court, further review by this Court is not warranted.

The Appellant misinterprets the decision of the Tennessee Supreme Court when it claims that the court's holding is contrary to *ARMCO, Inc. v. Hardesty,* ____ U.S. ____, 81 L.Ed.2d 540 (1984). By reading one sentence out of context the Appellant attempts to manufacture a conflict when none exists. The Appellant challenged the business tax on the basis of whether it was properly apportioned. The Court, relying on prior decisions of this Court, held that the tax was properly apportioned since it applied only to the taxable privilege of doing business in Tennessee. The business tax was measured by sales proceeds from sales through Westinghouse's Tennessee offices to a Tennessee buyer.

This taxable privilege is not taxable in any other state. When a tax is properly apportioned, then by definition there is no risk of multiple taxation. Other states cannot tax the privilege of doing business in Tennessee. Thus, there is no conflict with *ARMCO, Inc. v. Hardesty, supra.*

Westinghouse's argument is predicated on a strained reading of the Business Tax Act, T.C.A. §§ 67-4-701 *et seq.* Westinghouse argues that the business tax is a sales tax and that the decisions of this Court on the constitutionality of privilege taxes are inapplicable because of the nature of the tax. The Tennessee Supreme Court rejected Westinghouse's assertion because Westinghouse lifts one clause from the Business Tax Act and construes it alone without reference to the balance of the statute. Further, Westinghouse ignored the clear legislative intent of the Business Tax Act. The purpose of the Act was to replace the numerous business and occupation taxes with one uniform business tax imposed on the privilege of doing

business. This statement of the legislative intent was made independently of this case in *Worrall v. Kroger Co.*, 545 S.W.2d 736 (Tenn. 1977).

The Tennessee Supreme Court's decision is in accord with the applicable decisions of this Court and there are no special or important réasons warranting briefs on the merits and oral arguments in this matter.

CONCLUSION

This appeal should be dismissed or, in the alternative, the judgment below should be affirmed.

Respectfully submitted,

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NO. 84-1155

IN THE

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OCTOBER TERM 1984

WESTINGHOUSE ELECTRIC CORPORATION,
Appellant,

v.

JOHN K. KING, COMMISSIONER OF REVENUE,
STATE OF TENNESSEE,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

WESTINGHOUSE ELECTRIC CORPORATION,
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JOHN K. KING, COMMISSIONER OF REVENUE,
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ON APPEAL FROM THE
SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellant, Westinghouse Electric Corporation ("Westinghouse") submits this Brief in Opposition to Appellee's Motion to Dismiss or Affirm. Westinghouse states pursuant to Rule 28.1 that the List of Related Companies, filed as Appendix J to

Westinghouse's Jurisdictional Statement, is currently accurate.

This appeal addresses the constitutionality of the Tennessee Business Tax Act, Tenn. Code Ann. §§67-5801 et seq. (presently §§67-4-701 et seq.). The issues presented in Westinghouse's Jurisdictional Statement are whether the internal consistency test enunciated by this Court in Armco Inc. v. Hardesty, 104 U.S. 2620, reh'g denied, 53 U.S.L.W. 3270 (1984), is to be applied in determining the constitutionality of the Tennessee Business Tax Act as imposed on Westinghouse and whether that Act satisfies the Armco test. The Armco test requires that a state tax on interstate commerce must have what this Court called "internal consistency," that is, if the same tax were imposed by every jurisdiction, it would not impermissibly

interfere with free trade. This Court in Armco recognized that impermissible interference with free trade exists where an interstate taxpayer faces the risk of multiple taxation. See also Freeman v. Hewit, 329 U.S. 249, 256 (1946), reh'g denied, 328 U.S. 832 (1947). Westinghouse maintains that the Armco internal consistency test is the proper test to be applied and that the Tennessee Business Tax Act is unconstitutional because it fails to meet that test.

Westinghouse respectfully suggests that the Appellee, the Commissioner of Revenue, State of Tennessee ("Commissioner"), fails to address these issues in his Motion to Dismiss or Affirm. Rather, by his extensive recitation of facts, the Commissioner seeks to obscure these issues by focusing this Court's attention on whether there was a

substantial nexus between Westinghouse and the State of Tennessee. Nexus is not an issue presented in this appeal.

The Commissioner also erroneously suggests that Westinghouse has taken out of context a sentence from either the decision of the Tennessee Supreme Court or from this Court's decision in Armco in order to "manufacture" a conflict between those decisions. The Tennessee Supreme Court stated clearly that Westinghouse "must demonstrate that it suffers from the burden of multiple taxation." Jurisdictional Statement, Appendix, A-23; Westinghouse Electric Corp. v. King, 678 S.W.2d 19, 26, reh'g denied, id. (1984). Applying this actual multiple taxation standard, the Tennessee Supreme Court concluded that the taxes imposed upon Westinghouse were properly apportioned. In Armco, this Court stated, however,

that a showing of actual discriminatory impact "is not the test." 52 U.S.L.W. at 4789. Contrary to the Commissioner's assertions, nothing has been taken out of context. Westinghouse relies on the holding of this Court in Armco. The Tennessee Supreme Court's holding is in irreconcilable conflict with Armco.

The Commissioner further obscures the issues presented in this appeal by mischaracterizing the scope of the Tennessee Business Tax Act in order to contend that there is no risk of multiple taxation. The Commissioner incorrectly asserts that the Tennessee Supreme Court held that the Tennessee Business Tax applies "only to the taxable privilege of doing business in Tennessee." See Appellee's Motion at 5. In fact, the Tennessee Supreme Court actually determined that the Tennessee Business Tax

Act applies to

> the privilege of doing business as that business is defined by the statute. The business of making sales of tangible personal property is a taxable privilege under the statute. Thus, the statutory provisions pertinent to this case do not tax all business activity but only that business activity engaged in selling tangible personal property. Jurisdictional Statement, Appendix, A-11; 678 S.W.2d at 23; (Emphasis supplied) (Footnote omitted).

The privilege "of making sales of tangible personal property" is, contrary to the Commissioner's contention, obviously a privilege taxable by more than one state.

This risk of multiple taxation is underscored by the Tennessee Supreme Court's further analysis of the Tennessee Business Tax Act. That Act defines a "sale" to include "any transfer of title or possession or both . . ." Tenn. Code Ann. §67-5804(b) (presently §67-4-702(a)(12)). The Tennessee Supreme

Court, in interpreting the Tennessee Business Tax Act, found "no explicit language in this subsection [Section 67-5804(b)] or the remainder of the Act limiting the tax to transfers of title within the state." Jurisdictional Statement, Appendix, A-12 and A-13; 678 S.W.2d at 24. It is uncontroverted that title to the equipment sold to TVA passed outside the State of Tennessee. Nonetheless, the Tennessee Supreme Court upheld the imposition of the tax on Westinghouse because possession of that equipment passed to TVA inside the State of Tennessee. Under this application of the Act by the Tennessee Supreme Court, the business of "making sales of tangible personal property" would not only be taxable by the State of Tennessee, but would also be taxable by other states adopting a tax statute identical to the

Tennessee Business Tax Act. For instance, if either Pennsylvania or Florida (or any other state), where title passed to TVA, adopted a tax statute identical to the Tennessee Business Tax Act, Westinghouse would be subject to actual multiple taxation--that is, both in the state where title was transferred and in the state where possession was transferred.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss or Affirm should be denied and this Court should note probable

jurisdiction and grant plenary consideration of this appeal.

Respectfully submitted,

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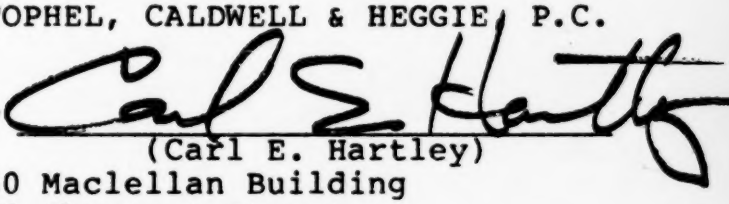
CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 28.3 of the Supreme Court of the United States, three (3) true and exact copies of the foregoing Brief in Opposition to Motion to Dismiss or Affirm have been deposited in the United States Mail with first-class postage prepaid, addressed to Mr. Joe C. Peel, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219, on this 7 day of March, 1985.

STOPHEL, CALDWELL & HEGGIE, P.C.

By 
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